85-1854

Supreme Court, U.S.
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CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

IRA BANKS

Petitioner,

v.

FINLEY-SELIGMEN & LATZ, INC.,

Respondent.

On Writ Of Certiorari to the
United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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32 pp

EDITOR'S NOTE

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QUESTION PRESENTED

Whether the employee civil rights were violated by the employer.The Civil Rights Act of 1964,as amended ,makes it an unlawful employment practice for an employer to discriminate against an employee because of race.When the stpulated facts reveal:(1) The employee were denyed compensation due to the employer acting on it,s own adopted a no - compensation practice for returned merchindise for repair defect. (2) The employer business engegement is selling its merchindise at retail.Title 29,Chapter V.dept.of labor employment standards administration wage and hour division Washington D.C. Part 779.Do not permit the employer to establish its pay-withholding policy on its own.

PARTIES

The caption of the case in this Court contains the names of all parties.

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OPINION BELOW

The United States Court Of Appeals For The Seventh Circuit entered its decision affirming the district court,s finding ,whereas the claims against the defendant were dismiss by the Seventh Circuit court of appeals.A copy of is reprinted in the appendix at J.A.(1) through J.A(7).

The Court of appeals For The Seventh Circuit denied petitioner,s petitioner for rehearing on September 26,1985.A copy of the Order is reprinted in the appendit at J.A.(8).

BASIS FOR INVOKING JURISDICTION

On September 26,1985,the Court Of Appeals For the Seventh Circuit entered Judgement affirming the denial of petitioner,s motion to remand the charges aganist respondent.(J.A. 8) .This petition for certiorari is timely because it was filed within 90 days of that decision.

The jurisdiction of this Court to review the

opinion of the United States Court of Appeals for the Seventh Circuit (J.A.1 through 8) is invoked under Title VII of the Civil Rights Act of 1964. 2000e et. seq.

CONTITUTIONAL PROVISION INVOLED

Title VII of the Civil Right Act of 1964, as amended makes it an unlawful employment practice for an employer to discriminate aganist an employee because the employee made a charge, testified, assisted or particpated in.

United States Constituation, Amendment conferred by 28 U.S.C. 1337, 1343, 42 U.S.C. 2000e-5(f)(1) and (3) 42 U.S.C.Section 1981.

Title VII provides a remendy for race discrimination in terms of employment and compensation on account of the employee race.

STATEMENT OF THE CASE

This is a cause brought by a former employee against his former employer for unlawful violation employment practice under Title VII of

the Civil Rights Act Of 1964, as amended makes it an unlawful employment practice for an employer to discriminate aganist an employee.The Jurisdiction of the United States District Court Eastern District of Wisconsin is conferred by 28 U.S.C. 1337.1343, 42 U.S.C. 2000e-5 (f)(1)(3) and 42 U.S.C. 1981.

Their were two (2) charges submitted in the Federal Eastern District of Wisconsin Court,both dismiss on summery judgement for the employer on Oct.13,1983. A appeal was made with the Seventh Court Of Appeals on 11/7/83.A panel of Seventh Circuit Court Of Appeals judge in this case to AFFIRMED IN PART, REVERSED AND REMANDED IN PART. The 1st (charge) affirmed portion by the seventh Circuit was attempted to be file in This Supreme Court Of The United States, but was denyed.Now the second (charge) portion of this case wish to be file. EEOC charge No.055801396.

Finley - Seligman & Latz, Inc., (former employer)is a company engaged in the business of

selling jewelry, watches, precious & semi precmetals, stones, and semilar items to consumers at retail prices.

Petitioner (hereafter the employee)skill trade was a jeweler with responsibility during his employment was to perform work on a varity of jewelry.Respondent (hereafter the employer) sold the jewelry to it,s customer,s .But, before respondent could complete sales in most coditions needed a jeweler (petitioner) to consummate skills on the jewelry.Respondent adopted a pay system for jewelers call a peace rate system .Respondent also adopted another pay system for jewelers(watchmakers) call a 30% Of coutomers price bases.Respondent made a self-proclaim statement in the record that they had a redo policy, that is ,the employee would not be compensated for CB . Come backs jobs.Petitioner discrimination charges is file against respond ent because their pay system discriminated aganist petitioner because of his race (black).

Petitioner appealed to the United States Court Of Appeals for The Seventh Circuit, an explain to the appeals to the appeals Court ,The Lower Eastern District Court vacated it,s Rule Of Civil Procedure in this case,whereas petitioner requested Plus file a motion for discovery.To wit,Federal Rule Civil Procedure 26(a)(b)(1)(3) and Rule 34 (a)(b) an(c).Theis was not a DISCOVERY IN THIS CASE.See petitioner Request an motion for discovery J.A. 9-15.

The particulars in petitioner charges (J.A. 16-19) were filed because intention retributions was taken aganist petitioner beginning with the day of hireing with respondent.Nevertheless the Seventh Circuit denied the petitioner petition for rehearing on September 26, 1985 .See J.A. 8 .

ARGUMENT

1. Introduction

The Seventh Circuit Court Of Appeals opinion is. Petitioner was unable to point to overt instance of harressment or discrimination aris-from the Discrimination charge which he filed.In this case,the record dispute witness claim they file a report with Mr. Hammock reguarding the meeting March 28,1980.But,

Sixteen months passed between the time that petitioner filed his discrimination claim and his subsequent termination of employment with the defendant. Although petitioner testified that Sadow fired him in retaliation for filing the claim, both Sadow , and Freinik testified othewise .AS such the court of appeals for Seventh Circuit agree with the district Court.

2. Reasons for Granting Certiorari.

The presented issues in this case is a matter of the lower Court substituteing facts for it,s own interpretation .Their was no discovery in this case.A important point is petitioner was not allowed to testify at trail about the meeting on March 28,1980 in Sadow Office the date petitioner was terminated .Whereas, the transcript show petitioner was sudbued by the Judge who presided during trail.

Transcript Of proceeding,held Jan. 10,1985.Case No. 80-C-1056,before judge John W. Reynolds.

Transcript page 61.

Mr.Chaet: Attorney.

Q: Did the meeting on March 28, 1980 focus on the bracelet?

A: Right.

Q: As far as you know,that was the purpose of the meeting, to discuss that?

A: That,s not necessarly that was the purpose of the meeting, simply because I had pointed out to them there was a number of cases where I show them that not only--.

The Court:

Wait,Wait.Whether it,s the purpose or not. That is what was discussed right?

Banks: Petitioner.

The braclet was discussed.

Transcript page 71-72

Mr. Chaet: Attorney.

Q: Okay. Looking at some of the reason for discriminatory statement,for the first one you said that you believe that you were discriminated because you had filed the first charge on November 28th,and the second reason refer to the special orders referring to in the above job assigned to me.You are referring to the braclet,right?

Banks: Petitioner.

No. That,s not exactly rignt.When I am referring to not only was this particular bracelet that I am referring to I wasn,t compensated for, there were many other repairs I was not compensated for.

In referance to the seventh circuit opinion petitioner was unable to point to overt instance of harrassment or discrimination charge which petitioner filed.Is simpley a matter of illegitmate justice in this judical system.Petitioner testimony in this case on January 10,1985 is he was not compensated for his work completed for respondent.Witness for respondent admit it themself, I am not able to point to adverse instance.See teanscript page 148.Futhermore,respondent witness established as fact petitioner skill was hard to come by.First see page 31 an compair petitioner testimony with it with the vice-president of finley-seligman & latz, inc., Department Robert Sadow transcript page 130.The point made because the Seventh Circuit Court Of Appeals openion is. Sixteen months is long enough for the employer to wait,Thus,claim in Federal Court for The Eastern District Of Wisconsin no action was taken aganist petitioner because

of elapsed time between the date the charges was file aganist respondent as opposed to the date petitioner employment ended with the employer.See J.A.6. Paragraph 2.Whereas, is this case the record reflect (1) The caucasions who ended their employment with respondent before petitioner was terminated were never replaced by respondent.Doxtater, caucasion (jeweler) left July 15, 1974. Lewis caucasion (jeweler) left May.1978 were never replaced by respondent.See record 21 no. 5.Banks,Black skill jeweler was terminated on March 28,1980.Petitioner is pointing a time period of 6 years respondent could not replace any of it,s jewelers respondent testified were hard to come by.(2) Respondent witness Costigan testimony in this case on January 10,1985,he,s now the jeweler for respondent. See transcript page 161.However,Affidavit record 19 & 20 Exhibit 1 or 3, which reflect Costigan caucasion was a watchmaker paid under a different pay system 30% of retail price bases. See J.A. 37. Paragraph 2.

Transcript Of proceeding, held Jan. 10,1985 case no. 80-C-1056, before judge John W. Reynolds.

Transcript page 161 Costigan - cross

Banks: Petitioner.
Q: Then are you a jeweler?
Costigan: witness
A: Yes, I can do it. And presently I an doing it
Banks:Petitioner
Q:You ,re presently doing it?
Costigan: witness
A. YES, I certainly am . and have been for some time.

As the record transcript show Mr. Costigan testimony covers several pages.NOT ONE STATEMENT IS TESTIFIED TO BY MR.COSTIGAN,WHEREAS, HE WORKED ON THE INSIDE OF WATCHES AS A WATCHMAKER FOR RESPONDENT,But.The record reflect he was paid as a watchmaker under a different pay system than petitioner.Where as petitioner testimoney on page 18 in this case " It is not the title,it is the performance what makes the sense" Also see transcript page 33 & 39 their is in this case a majcr difference between what respondent gave it,s employees the title vs. their performance for respondent.The record do not

show one affidavit on file or a single statement on file in this case by a person named a watchmaker an was paid under a different pay system by respondent,his or her performance was for respondence was inside watches or he in fact have the skills of a watchmakers.

The claims aganist respondent is reprented in the joint appendix (J.A.16-19) as contained therein. Over a period of several years respondent unlawful discriminated aganiest petitioner, first with hireing ,then with wages differental which had a negative effect on petitioner because he is a minorty race.

Under linging the manner respondent caused the adverse action aganist petitioner is by giveing petitioner diffcult time consumeing jobs to complete while caucasions receave easyer jobs to do.Each job task were assign a random number requireing different amounts of time to finish the repair,and yield different amount of cash value to the employee that receave the job task.

In order this Court to see side by side respondent inconsistency in their explanation of how their pay system was established for it,s employees.See J.A.28, paragraph 1.An see testimony below.

Transcript of proceeding, held Jan. 10,1985.Case No.80-C-1056,before judge John W. Reynolds.

Transcript page 150-151.

Banks:Petitioner

Q: It,s on the point system in the brief stating you get paid for estimating?

Freinik:witness.

A. No,that was compensated into the price of what you get per point.As an average. Now some jobs they take a little bit longer time, some jobs take a little bit less time.it is impossible for a repair shop to make individual prices for individual jobs.Take a watch repair,to over haul a regular wind watch cost so much.In some cases the watchmaker spends a lot more time on it because it,s a lot more complicated than others. Some you gain,some you lose. The point system was calculated on an average base and so it was with jewelry repair.With some repairs you spend more time and you might have lost a little bit.

> So some jobs that were easier done and went well, you got faster and you gained. The point system was computed by me in a way that it would even out and you could make an acceptable living.

Respondent smoke screen the claims file aganist them in this case by stateing on record they had Two caucasion jewelers under the same pay system as petitioner therefore, The Court should dignify the pay system respondent used to pay it,s employee,s . But respondent refuse to show the courts below how they were paid together with facts of what they were paid. See J.A.40-41. Whereas ,evidentiary Exhibit 6, show petitioner was short changed by paying him less than what was actually on his weekly production sheets. See 44,a,b & c. In additionaly giveing petitioner jobs task to redo over again with out compensating petitioner for his skills, time, an labor spent doing jobs task the first time an what was call a redo the second time.

While caucasions were compensated for all of their work they completed.Mr. Freinik admit in his testimony the point system was heavely flawed (see transcript page 151).Mr Gerhard Freinik testimony is respondent peace rate system was " The point system was computed by me in a way that it would even out and you could make an acceptable living".

The Rules under Title 29- Labor Chapter V- Wages and Hour Division Department Of Labor Part 779-The Fair Labor Standards Act As Applied to Retailer Of Goods Or Services,Fedreal Statutory Rule 779.417 states the manner respondent Must establish commission pay system used to pay its employees who were paid on a regular commission basis.At a rate of pay that,s fair to employees an employer.The pay system was not to be established by Mr. Freinik in his owne image.

FEDERAL STATUTORY RULE 779.417.
Compensation representing commission constitutes most of an employee pay.Must be

> determined by testing the employee,s compensation for a respresentative period.the act does not define a representative period, but plainly contemplate a period which can reasonably be accepted by the employer,the employee,and disintrested persons as being truely representive of the compensation aspects of the of the employees employment on which this exemption test depends.
>
> An approprate representative period or formula for establishing such a period must be designated and substantited in the employer record.

Testimony by witnesses on behalf of respondent stated finley - seligman & latz,inc. had a redo policy for its employees,that in effect reguardless to who fault it was the employee would not be compensated for a redo job task. See J.A.30 #7,J.A.31 # 8.Petitioner stated on earlry page of this petition ,Mr. Freinik told the Court respondent did not compensated the petitioner for some repairs.Read transcript page 148 . (I am sure Judge John W. Reynolds and the panel of the Seventh Circuit got paid for their redo handling of this case the second time).

Transcript Of proceeding, held
Jan.10,1985 Case No. 80- C -1056
Before Judge John W.Reynolds.

Transcript page 148.

Mr. Chaet: Attorney
Q: Mr. Banks testified he receaved
no compensation for doing some work.

Freinik; Witness
The only time he diden,t get compensation for work is on what we call CB. Come backs.That means something wasn,t done properly or didnt hold up and it was returned.

The only reason other repairs like example evidentiary hearing Exhibit 1 & 1a (see J.A.21) is a redo is because the person given the redo jobs task is black.The only reason petitioner was not paid like caucasions is because he is black.The only reason the respondent was not held accountable for his acts of vilations of afrosaid Constitution amendment conferred by Title VII of The Civil Right Act of 1964 is because they are caucasions.The Seventh Circuit of Appeals order No.85-1188 page 4 paragraph 2 goes so far to even state ,"Basically this case hinge on a question of credibility which we

are hesitant to second - guess on appeal absent clear error" (see J.A.6).

Title VII of The Civil Right Act of 1964,as amended, Makes it unlawful employment practice for an employer to discriminate aganist an employee with respect to his race.42 U.S.C. 2000-e - 2. The proma facie case in employment discrimination is not inflexible and categorically proof necessary to establish a prima facie case will very depending on the realm of such actuality .See McDonnell Douglas v. Green 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed.sd 668 (1973).

In the above case set forth the basic allications of burdens and order of presitation of proof in Title VII.

The basic burden and order of presitation of proof in this Title VII case was established by respondent ,they admitt to what were doing that is they weren,t paying petitioner for all of his work completed.

As stated before on January 10,1985.A evidentiary hearing was held in this case before

Judge John W. Reynolds ,case no 80-C-1056.As the record show the judge dismissed this case on summary judgement.The Seventh Circuit Court of Appeals Remand (a redo) for the lower Court. Petitioner testimony during the hearing is he was not compensated for repairs he completed the first time.Transcript page 56,57, & 62.On page 72 petitioner testimony is there were many other repairs he was not compensated for.

Transcript Of proceeding, held Jan.10,1985 Case No.80-C-56 before Judge John W. Reynolds.

Transcript page 57,Petitioner Banks-cross.

The Court:
Q: To Mr. Freinik when he asked you to repair it the second time.
Banks:Petitioner.
A: I don,t recall exactaly what I said,but I pointed out that for the amount of work that went into it the first time,I hadn,t been compensated for.(see J.A.21). They wanted me to do it all over again for a second time.I hadn,t been compensated for it the first time.So in essence what you are saying is even though I wasn,t paid for it the first time,Ihad to do it over again and not be paid for it again.

The: Court.

Q: Why weren,t you paid for it the first time?

Banks: Petitioner.

A: I don,t know.See,that,s the irony of the whole thing. Any number of jobs that come down and they decide they don,t want to pay you for them,you don,t get paid for them, even though you perform the work on them.

The:Court.

Let,s talk about this job. (Evidentiary hearing Exhibit 1).

Banks.Petitioner.

A: All right.

The:Court.

It was not repaired the second time time and because you weren,t paid for the first time.

Banks:Petitioner.

A: Right.

The: Court.

What else do you want to establish?

Mr.Chaet: Attorney.

How do you know you weren,t paid for it the first time?

A. How do i know I wasn,t paid?

Q. After you repaired it the first time.

The:Court.

Hold the phone. when you ask aquestion,take one at a time. keep a mental note if you want to ask the second. I think it confuses witnesses when a question is asked and then lawyers say well,in other words.

Then you get double questions. The question is how do you know you weren,t paid the first time?

Banks.Petitioner.

It,s simply because the work production sheets(See example of evidentiart hearing exhibit 6,in the appendix J.A.44a & b). that particular week, in other words you transfer that number into this here, you dont find it on any of them.

As stated before, their was no discovery in this case.The court asked petitioner what else did I wish to establish as shown in the above testimony.But the court did not allow petitioner to testify on all aspects of the retaliation charge file in this case.Whereas, the above testimony show the court wanted to talk about evidentiary hearing Exhibit 1 (see 21,a,b. & c in the Appendix).

Example,in the appendix at 44,a,b,c. The production sheet week is dated 7-27-74.It have a total number points for that week 357, in monetary value is 45¢ each point.45¢ x357 = $106.65 Mr.GERHARD FREINIK OFFICE change

Petitioner monetary week commission to $106.65. That,s a $54.00 difference in what petitioner legitimate pay is.(see 44c).IN additional J.A. 45 show petitioner was to be compensated for polishing and rhodium on each job task listed on week 7-27-74.Polishing $44.68 and plating $14.88 a total of $59.56.The net lost for the petitioner in 7-27-74 week is $113.56.This is a minimum wage lost for petitioner over the years the figures gets higher.

The difference in the above Seventh Circuit Court of Appeals judgement vs. the testimony is being able to compair facts.' MR.Freinik testified that he requested for petitioner to redo the braclet(evidentiary hearing Exhibit 1) is because it was not up to Mr. Freinik standered (read transcript pages 91-93).Futher more Mr. Freinik testified it was based on petition race in -part is why he wanted petitioner to redo the bracelet over a second time (seetranscript page 145).

Huddlestion v. herman & Maclean,604 F. 2d 534, 552,(5th Cir.1981) an condidering

Bohannon v. Pegelow, 652 F. 2d 729 (7th Cir. 1981). Lay witness may testify to key issue of motivation of the defendant.

Transcript Of proceeding,held Jan.10,1985 Case No.80-C-1056 before judge John W. Reynolds.

Transcript page 152. Freinik cross.

Banks.Petitioner.
Judge ,am I not entital to minimum wages?

The Court:
Not in this lawsuit.You are entitled--the question here is whether or not you were fired because you filed that complaint aganist EEOC.

First of all petitioner never file a compla int aganist EEOC.Second petitioner was not allowed to question the witness on all aspect of the charges file aganist them.

Title 29 Labor
U.S.DEPARTMENT OF LABOR EMPLOYMENT STANDARDS WAGE AND HOUR DIVISION,WASHINGTON D.C.
Part 779 The Fair Labor Standards Acts As Applied to retailers Of Goods Or Services.

The rules and regulation are statutory rules. whereas , respondent business engegement is

in the state of wisconsin is goverened under these rules as is respondent system of paying it,s employees.See J.A. 23 - 24.

RULE AND REGULATIONS

Rule 779.416(c) A commission rate is not bona fide if the formule for computing the commission is such that the employee, in fact, always or almost earns the fixed amount of compensation for each work week (as would be the case where computed commission seldom or never equal or exceed the amount of draw or guarntee).

Rule 779.417.Whether compensation representing commission constitutes most of an employee pay so as to satisfy the exemption condition contained in clause (2) of section 7 (i) must be determined by testing the employee,s compensation for a "representative period"of not less than 1 month.

Rule. 779.501: No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which employees are employed.

Youngerman - Reynolds Hardwood Co 325 U.S. 419. As the Supreme Court explained the meaning of regular rate. It is the hourly rate actually paid the employee for the normal ,nonover time workweek for which he is employed.

Rule 779.213,779.241 an 779.320. Is in the appendix at 23 24 & 24a.It therefore is established ,respondent business engagement in the state of Wisconsin is Selling.

Rulr 779.305 :Their is no such functional seperation between activities of selling goods or services at retail.

As J.A.20 show only one exhibit was sent to the Seventh Circuit Court Of Appeals. J.A. 22 their were 12 Exhibits offered as evidence in this case. No.1,2,3,4,6,7,8,10, & 11 s hould have been included in the records for judgement.

Whereas , respondent claim they had a redo policy ,but they did not show proof thay could validate this as fact,s.Petitioner continue to state respondent did not have a redo policy.An petitioner was terminated March 28,1980.

However, those facts that is placed before the courts eyes seems to draw them shut.The establish fact,the transcript show Mr.Freinik "YES" to petitioner race during the testimony hearing.

Transcript Of proceeding,evidentiary hearing held January 10,1985,case No.80 - C - 1056 before Judge John W. Reynolds.

Transcript page 145,witness Freinik direct

Mr. Chaet attorney.

Q:Did Mr. Banks ,race have anything to do with your request to have him do that repair on the bracelet over a second time? Is that why you asked him to do a second time?

Mr. Freinik witness.

A. yes.

Mr.Chaet attorney

Q: Was it because he,s black ? thats why you had him repair it over a second time?

Mr. Freinik witness.

A. No. definiately not. First of all I would like to point out I am a Born again Christian.It is aganist my religion to discriminate against any man what so ever.I was not brought up in this country.

A analysis of the above questions is they are seperate an different questions. The first question is Did Mr. Banks Race have anything to do with YOUR REQUEST to have him do that

braclet over a second time? The second question to Mr. Freinik was. Was it because he,s black? That,s why you had him repair it over a second time.

Jenkins v. Anderson 447,U.S.231,239,100 S. Ct. 2124, 2130,65 L.Ed. 2d. 86 (1980).Common law traditionally has allowed witness to be impeached by their previous failure to state a fact circumstances in which that fact naturally would have been asserted.

Also see Federal Evidence Rulr 613 an 613.5. The fact show that the witness testimony on behalf of respondent is in consistent with their previous statement .See J.A. 25-41.

Petitioner money tary loses is $ 160,000. Plus punitive damages.

CONCLUSION

This Court should issue its writ of certiorari to the United States Court Of Appeal for the Seventh Circuit , and should reverse that

Court,s decision.

Respectfully submitted,

Ira Banks

March 15 1986

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

IRA BANKS

PETITIONER

v.

FINLEY-SELIGMAN & LATZ, INC.,

RESPONDENT

PROOF OF SERVICE

The undersigned hereby certifies that copies of motion petition for writ or Certiorari to the Court Of Appeals For The Seventh Circuit on counsel for respondent by encloseing copys thereof in an envelop.First Class postage pre-paid, Address to

Barry L. Chaet
Kroukoski & Associates, S.C.
7111 West Edgerton Avenue
Milwaukee, WI 53220

and depositing same in the United States Mail at Milwaukee, WI .On this 15 Date of March

Ira Banks

85 - 1854

Supreme Court, U.S.
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FINLEY-SELIGMAN & LATZ, INC.,

Respondent.

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APPENDIX

EDITOR'S NOTE

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UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago, Illinois 60604

Submitted August 22, 1985

September 4 , 1985

Before

HON. Walter J. Cummings, Chief judge

HON. Harlington Wood. Jr. Circuit judge

HON. Jesse E. Eschbach, Circuit judge

Ira Banks, Plaintiff-Appellant, vs. Finley-Seligman & Latz, Inc., Defendant-Appellee.	Appeal from the United States District Court For the Eastern District of Wisconsin
No.85-1188	No. 80-C-1056 John W. Reynolds Judge.

ORDER

Plaintiff-appellant Ira Banks appeals the district court order of January 10,1985 dismissing his employment discrimination action aganist defendant-appellee, Finley-Seligman & Latz, Inc., We affirm for the reasons explained below.

I.

Banks, a black jeweler, filed two employment discrimination claims with the Equal Opportunity Commission aganist the defendant,his employer. The first claim alleged that the defendant,s pay system was discrimintory because it cause him to be paid less than certain white employees.The Second claim alleged that Banks was discharged by the defendant in retaliation for protected Title VII activity.

After preliminary examination of the briefs the the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "statement need of oral argument" See Rule 43(a), Fed. R. App. P.;Circuit Rule 14(f).No such statement havebeen filed, the appeal has been submitted on the briefs and record.

See 42 U.S.C. 2000e-3 Klein v. Trustees of Indiana University, No.84-2124.Slip op.(June 20, 1985) Mozee v. Jeff boat,Inc. 746 F.2d 365 (7th Cir.1984). McCluney v. Jos. Schlitz Co. 728 F. 2d 924 (7th Cir. 1984)

After receaving right to sue letter on both claims, Banks filed suit in federal district court raising both claims. The district court granted summary judgement for the defendant on both claims. On appeal we affirmed by unpublished order the grant of summary judgement on both claims.that the defendant,s pay structure was discriminatory,Banks v. Finley-Seligman & lotz, inc. No.83-2981, unpublished order (7th Cir. Oct. 29,1984).We reversed and remanded for further proceeding, however,with respect to the claim that Banks was terminated in retaliation for fileing a claim aganist the defendant.On remand the District court held a lengthy evidentiary hearing at the conclusion of which it dismissed Banks claim, finding that Banks had failed to establish that he was terminated in retaliation for filing a discrimination claim aganist the defendant. it is from this decision that Banks appeals.

II.

Construing Banks, pro se briefs liberally, Hains v. Kerner, 404 U.S. 519,520-21 (1972); Bates v. Jean, 745 F. 2d 1146, 1150 (7th Cir. 1984),Banks contend

the district court erred in concluding that he was not discharged in retaliation for filing a discrimination claim. "To establish a prima facie case of retaliatory discharge under 42 U.S.C. 2000e-3, The plaintiff Must show: (1) he opposed an employment practice that was unlawful within the meaning of Title VII; (2) he suffered an adverse action by his employer; (3) because of his opposition or participation"(footnote omitted)Klein, slip op at 7; Rucker v. Higher Education Aids Bd., 669 F. 2d 1179, 1182. The plaintiff must additionally establish that the employer "would not have taken the adverse action, but for, his opposition or participation " Klein ,slip op. at 8 citing McCluney v. Jos. Schlitz Brewing Co., 728 F. 2d 924, 928 (7th Cir. 1984).

The Prima facie proof annalysis set forth in Mc.-Donnel Douglas Corp. v. Green,411 U.S. 792 (1973) is applicable to retaliatory discharge claims, See Texas Department of Community v. Burdine, 450 U.S. 248, 235 n.5 (1981)(The McDonnell analysis is flexible and adaptable to different fact situations);Klien, slip op. at 7, n. 3. Once the plaintiff establishes a

prima facie case of employment discrimination a rebuttable presumption of discrimination arises and the burden then shifts to the defendant to rebut the discrimination by articulating a legitmate, nondiscriminatory reason for its action. McDonnell Douglas, 411 U.S. at 802. If the defendant successfully rebuts the presumption of discrimination that the alleged reason for the employment action was merely pretextual. Id.

In the present case, we vacated the award of summary judgement on the retaliation claim and remanded this case to the district court for further proceeding.On remand, Banks tried his retaliation claim before the district court and at the conclusion of the trail, the district court entered judgement for the defendant,finding that Banks had failed to demostrate that he was discharged in retaliation for fileing a complaint aganist the defendant."In this Title VII case,our ultimate task is to detremain whether the (plaintiff have) proven that the defendant have Discriminated aganist(Them)"moze 746 F. at 369,Citing Espstein v. Secretary, 739 F.2d 274,278(7th Cir.1984).

The record reflect that Banks was hired by defendant as a jeweler in 1972, that Banks filed a discrimination claim aganist the defendant relating to the methods of payment on November 28, 1978.,and that Banks left emlpoyment with the defendant on March 28, 1980, 16 months later.Banks then filed his second discrimination claim, alleging that he had been discharged in retaliation for filing his discrimination claim 16 months. earlier.During this sixteen month period,Banks work assignment and hours remaind the same.On March 28, 1980, a dispute arose over repairs completed by Banks on a braclet.Freinik, Banks ,Supervisor, requested Banks to redo repairs to the bracelet because they had not been completed correctly the first time.The defendant policy in effect at the time required all employees to redo work again for various reasons, regardless of whose fault it was. (this order suggest ,See transcript at 104 this case)

Basically, this case hinges on question of credibility which we are heasitant to second guss on appeal absent clear error.Anderson v. City of Bessemer City, __U.S.___,105 S.Ct. 1504, 1512-13 (1985);

In re Lemmon & Co., Inc.,742 F. 2d 1064, 1070 (7th Cir. 1984); Luedtke Eng. Co. v. Ind. Limestone Co., 704 F. 2d 598, 601 (7th Cir. 1984); Walsh v. Brewer, 733 F. 2d 473, 477 (7th Cir. 1984).Ample evidence supported the district court,s determination that Banks was not discharged in retaliation for filing a discrimination claim. Sixteen months passed between the time that Banks filed his discrimination claim and his sudsequent termination of employment with the defendant. Banks himself was unable to point to overt instances of harrassment or discrimination arising from the discrimination charge which he filed.1 Although Banks testified that Sadow and Freinik testified otherwise.As such ,we agree with the district court that Banks failed to establish that he was terminated in retaliation for filing a discrimination claim aganist the defendant.

AFFIRMED.

The COURT:now why do you think one year and four months later, when you were discharged that you were discharged for filing that complaint on November 28, 1987? Why do you think that
A.Why do I think it? Simply because at the time from November of 78, until I was terminated,The type of work they needed done,I was the only one doing it. And this was in regards to their sales.

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago, Illinois 60604

September 26,1985

Before

Hon. Walter J. Cummings, Chief Judge

Hon. Harlington Wood, Jr. Circuit Judge

Hon. Jesse E. Eschbach. Circuit Judge

Ira Banks, Plaintiff-Appellant.	) Appeal from United States District Court for the Eastern District Of Wisconsin.
NO. 85-1188	)
Finley-Seligman & Latz, Inc., Defendant-Appellee.	) No.80-C-1056 John W. Reynolds Judge

ORDER

On consideration of the petition for rehearing filed in the above-entitle case by plaintiff-appellant, all of the judges on the panel have voted to deny a rehearing .Accordingly,

IT IS ORDERED that the afrosaid petition for rehearing be, and the same is hereby

DENIED.

J.A.(8)

6507 North 84th Street
Milwaukee, WI 53224
February 21, 1983

Barry L. Chaet. Esq
811 East Wisconsin Avenue
Suite 311
Milwaukee,WI 53202

RE: Ira Banks vs. Finley-Seligman & Larz, Inc.,
80-C-1056

Dear Mr. Chaet;

Anticipating the cooperation of defendant and to avoid the necessity of a formak motion.I Ira Banks request you provide me with document that are clearly readable an every affort is made on your part to insure that alldocument that is forwarded to me, by the defendant. Is not obscure. I request you provided me with copies relating to the following:

1. A complete copy of my personal file, as to any documents excised or withheld, please itemize and index including or reason asserted.

2. With respect to my jod performance and termination, provide all defendant documents includeing,but not limited to, all communication such as correspondence, memoranda ,notes,evaluation,opinions,ect,to documents excised or with held,please itemize and

index including privilege or reason asserted.

3. Adhere to the request, by Ira Banks, for REQUEST FOR PRODUCTION PURSUANT TO FED. R. CIV. P. 34 .

thank you very much.

Sincerely

Ira Banks

RECORD 34.

IN THE UNITED STATES DISTRICT COURT
For The
EASTERN DISTRICT OF WISCONSIN

Re: Ira Banks
vs.
Finley-Seligman & Latz, Inc.,
Case No. 80-C-1056

REQUEST FOR PRODUCTION

To: Mr. Barry Chaet
811 East Wisconsin Ave.
Suite 311 Juneau Squeare South
Milwaukee, WI 53224

Date of Request: Feb. 21, 1983
Date of Compliance: March 23, 1983
Place of Production: 6507 North 84th Street
Time of Compliance: 10:00 O Clock AM.

REQUEST FOR PRODUCTION
PURSUANT TO FED. R. CIV. P. 34

You are hereby requested pursuant to Fed. R. Civ. P. 34 to produce for inspection and copying at the above designated place , date and time all of the following materaials which are the possession, custody or control of yourself, your attorney, or any agents of your attorney or any agents of your attorney or of yourself.

The word"document" as used herein, includes the orginal or copies of any written , typed, printed,

recorded or graphic matters however produced, including, but not limited to, pamphlets, periodicals, circulars, bulletins, letters, telegrams, correspondence, memoranda, notes, minutes, records, vouchers, purchase orders, sales orders, quotations, invoices, bills, estimates, reports, proposals, ledgers, interoffice communications, drawings, blueprints, plans, specifications, brochurs, tear sheets , articles , agreements , contracts, checks, tape recodings or transcriptions thereof,or any other writings, however produced or reproduced which are in your actual or contructive possession or control, or any agent, attorney or affiliate thereof. Whne a document is requested it is the original which is requested, and copies should be produced only when the original are not avaiable.

The word"photograph" as used herein includes all prints, including contact sheets, made from any negatives; all negatives regardless of whether said negatives have been used to make prints; all exposed film regardless of whether it has been developed into motion pictures, developed or undeveloped, along with any type of video tape.

6507 North 84th Street
Milwaukee, WI 53224
March 18th, 1983

The Honorable John W. Reynolds
United States District Court
Eastern District Of Wisconsin
471 Federal Building
517 East Wisconsin Avenue
Milwaukee,WI 53202

Re:Ira Banks — Notice Of Motion
vs.
Finley-Seligman & Latz,Inc.,
80-C-1056

Dear Judge Reynolds.

pursuant of a motion filed by defendant, plaintiff file a responce a informed motion, that was recently filed by defendant, plaintiff was not aware of any motion until plaintiff contacted the defendant attorney to request a date for depose two persons, I was informed that a motion was filed lately for a protective ordre of documents an Mr. Robert Sidow.

Plaintiff states that a motion for summary judgment was filed by defendant approxi date 29th,day of June 1982.Approxi, four years after the defendant filed a document with E.E.O.C. Defendant exhibit A stateing salaries of jewelers employed by the defendant at 101 west wisc.Ave. Milwaukee.Repair dept.

The defendant exhibit is a commission report dating from July 1977- Nov.1978.The defendant have failed to show a full explanation of how the salaries in the commission report came about.

Plaintiff presented documents approxi, date Feb. 7, 1983 Exhibit B.C. & D.Plaintiff exhibits are in direct disagreement with defendant Exhibit A. Plaintiff Exhibit B,C, & D. Are linked to the commission report that the defendant have presented to E.E.O.C. Four years ago. The commission report is dated 12-20-78.Plaintiff have repeated a request for document from defendant, the defendant have repeatedly illustrated prejudice towards plaintiff,plaintiff latest request for document dated Feb.21st 1983.Which is on file with federal court.

position is that the request for document From the defendant should not be delayed based on a summary judgement or other motion motion that are in opposition to plaintiff request,their was,ent a motion for summary judgement at the time the commission report was filed with E.E.O.C.

Plaintiff is now fileing a motion in pursuant

of plaintiff position on all suporting motions filed approxi, Feb. 7th 1983.

PLAINTIFF MOTION IS

(1) Plaintiff motion of documents from plaintiff be immediately complyed by defendant. pursuant of requested dated ,Feb. 21st 1983.

(2) Plaintiff motion to depose Mr. Robert Sadow presently employed with finley-seligman & latz, Inc., at 101 west wisc, ave. Milwaukee.

Date of request to take deposition is April 13th, 1983. Time, 10:00 O Clock AM.

Place.6507 north 84th Street Milwaukee,WI 53224 By Ira Banks before a Notary Public.

(3) Plaintiff motion to depose Mr. Gerhard Freinik W132 N 6011 March Rd. Man Fls. A former employee of finley-seligman & latz, inc., at 101 west wisconsin ave.Milwaukee. Position was manger.

Date requested to take deposition is April 13th, 1983.Time, 11:30 O Clock AM.

Place. 6507 North 84th Street Milwaukee,Wi Zip 53224.By Ira Banks before a Notry Public.

RECORD 36
Document Notarized.

(CHARGE OF DISCRIMINATION)
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND
WIS.EQUAL RIGHTS DIVISION (State or local Agency)

Name ..... Ira Banks
Street Address ...6507 North 84th Street Mil,WI.
Name Of Employer..... Finley,Incorporated
Street Address ...101 W. Wisc. ave. Mil, WI.
Race ..... Black

The Particulars Are:

I. Personal Harm- I have been employed by the above named respondent as a jeweler for almost Six(6) years At the present time, Watchmakers employed by the Respondentare paid Thirty(30%) of the retail value of the work they do, while I am paid on a piecework basis, as a result the Watchmakers receive considerably more pay for the amount of work done than I receive.I have asked my Supervisor,Gary Freinik, to put my pay on the same basis as that of the Watchmaker, but he has refused to do so.

II. Respondent,s Reason for adverse Action.Mr. Freinik has told me that he can not pay me thirty percent (30%) of retail because much of my work is with gold and precious stones, which have a very high initial cost compared to the amount of work invoned on my part.

III. Discrimination Statament-Ibelieve that the respondent,s has discriminated aganist me because of

my race,Black, for the fellowing reasons:

a. I am the only jeweler employed at the Respondent,s facility.All of the Watchmakers at this facility are White.

b. The Respondent employed two(2) Jewelers until May, 1978 .Mr. Freimik recently told me that production of jewelry has dropped only one percent(01%) since then. He also told me I am Produceing more than Watchmakers.

c. Even if Mr.Franik,s statement about the price of gold and precious stones is true i could be paid a proprotion of the retail price after the cost of the stones was deducted.Ibelieve that the amount of work I do on gold is sufficient to justify giving me a proportion of the retail value. There are also others ways of bringing my pay up to a comparable level.

d. I have had previous problems with the respondent because of my race. For example, after I had worked for the Respondent for some time at an hour wage,and was producing enough to justify a different method of payment the Respondent attempted to keep me at an hourly wage. This was not done to White Employees.

Dated: 11-28-1978. Charge No. 055790245

RECORD 14. Exhibit A.

(CHARGE OF DISCRIMINATION)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND
WIS. EQUAL RIGHTS DIVISION(State or local Angency)

Name.....Ira Banks
Street Address ...6507 North 84th Street Mil,WI.
Name Of Employer ... Finley, Inc., Seligman & Latz, Inc.,
Street Address...101 w. Wisc.ave. Mil, WI
Race.....Black
Retaliation 704(a)
Date Most Recent Or Continuing Discrimination took place(Month, Date, and Year) March 28,1980.

The Particulars Are:

1. PERSONAL HARM: I have been employed by the above naned Respondent as a Jeweler for eight (8) years. On March 28, 1980 I was Discharged from that position.

2. RESPONDENT,S REASON FOR ADVERSE ACTION: Mr.Robert Sadow ,Manager,Stated That I was discharged for not doing special jobs that Gary Freinik would give me to do.

3.DISCRIMINATION STATEMENT: I believe I have been discriminated aganist because of my race(Black) for the Following reasons.

a. On November 28,1978, I filed a charge No. (05579024S) of discrimination aganist the adove named respondent and I believe that My discharge on March28, 1980, was in retaliation for filing

a previous charge with the Commission.

b. The special jobs that I referred to above were jobs assigned to me that I had previously done and was required to do again for certain other repairs that were not indicated on the original job order. These special repair jobs were time consuming and without compensation for the time I spent doing them. Ifeel That This was unfair and discriminatory because the error was not on my part in the beginning.

Dated: 4-3-1980 Charge No. 055801396

RECORD 14 Exhibit B.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT Of WISCONSIN
Office Of The Clerk

RECORD TRANSMITTAL LETTER

July 31,1985

Thomas F. Srubbe, Clerk
United States Court Of Appeals
For The Seventh Circuit
219 South Dearborn Street
Room 2722
Chicago , IL 60604

Re: Ira Banks vs. Finley-Seligman & Latz, Inc.,

Trail Court Docket No. 80-C-1056

U.S. COURT OF APPEALS DOCKET No.85-1188

Dear Strubbe:

I am sending you herewith the oribinal/supplemental (delete in applicable entry) record on appeal. It consist of the following.

1 volumes of Pleading

1 volumes of Transcripts

Exhibits: 1 envelop

Please acknowledge date of recipt of the above materials on the attached copy of this letter.

SBN/

Very truely your,s
Sofron B. Nedilsky
Clerk of Court

cc: Ira Banks
Barry L. Chaet

FINE JEWELRY

Gimbels

WATCH REPAIR

97169 CC

2/14/80

APPROX. DUE: 2/27/80

ESTIMATED PRICE: $

OVER TIME • 9HR. S • NOT PAID FULL DAYS WORK • NOT PAID • NO LUNCH BREAKS

REC'D: 2/14/80 APPROX DUE: 2/28/80 97169 CC

PHONE: 475-8788 H 332-4533

NAME: R. R. Kania

STREET: 2925 N. Downer

CITY: Milw. Wis. 53211

R

DESCRIPTION: 14K Lenco bracelet

CONDITION: New $970

ESTIMATE X

FINE JEWELRY X

COST. JEWELRY

WATCH REPAIR

ENGR.

RESTR.

TIMEX

NO GUART.

HOLD

CLERK: MJR

Needs 2 links to make longer or extender for that length.. Make plate Ask Gary Talk to Engineering EST. 2/15 or EST. Lengths. What's the cost?

CUSTOMER SIGNATURE

TOTAL $

EVIDENTIARY Hearing EXH. 3, pt 1

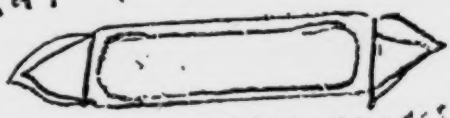
MILW 22

1-10-85

J.A.21

97169cc

Instruction say 2 links bar was completly finish every
Bar was completly finish every
For polishing spent any more



Craig cc say bar was finish
3 links links 2'x 6 mm Bar stock
1 x 3 mm Frame made Around
links measure 2 x 6 bar stock

3/4 inches long

stock given time by Fromit
For exact lent

2 link harmonic 1 + vertical
Bracket with a quick release

Exhibit 1A

J.A.(21a)

BAR WORKING INTO BRACKET

DELAY CALL

Initial	Store	Job Nu.
	Welding	14x50 Dew

Customer Phone _____ 4 inch Factor solid

Customer Name _____

Customer Address This Drawing Is Side

OF Bracket That Was Made.

Customer called Which Is exactly The size Of

Card sent A Drawing Done By

Called by The Engineer Craig Capel

Job will be done Cut + Total Length Of

We will call Bracket that was made 9 4

Reason Inches Long. This Agreement

Part on order Duplicate Between Gary

Need time for testing Mark & Because Of

Must go to factory The Length Of Bracket 9

Can't meet date We Said It Should Have Been

Other: 3 Inches Long. Craig Was In

Any Office At the Time Of Drawing-

ment. 3-7-80 AM

Dept. 787

J.A, (21b)

LO 187
Rev. 1/80) ●

EXHIBITS

Banks

vs.

Finley Seligman

CAUSE NO. 80-C-1056

DATE	Identification No.	Identification Witness	DESCRIPTION	OFFERS OBJECTIONS RULINGS EXCEPTIONS
1/10	1	Banks	Photocopy of worksheet ~~envelope~~ envelope	O+R
"	2	"	"Fine Jewelry Repair" price sheet	O+R
"	3	"	points - wage sheet	O+R
"	4	"	~~Description sheet~~ point system sheet	O+R
"	5	"	2 rings taped to sheet	O+R
"	6	"	work category sheet	O+R
"	7	"	1st EEOC charge	O+R
"	8	"	EEOC charge of retaliation	O+R
"	9	Sadow	3/26/80 summary of ruling	O+R
"	10	"	~~Cross~~ Cross's	objection overruled O+R
"	11	"	~~Cross~~ Cross's	objection overruled O+R
"	12	Frank.	Memo re events of 3/25/80	O+R

§ 779.213 What is a common business purpose.

Generally, the term "common business purpose" will encompass activities, whether performed by one person or by more than one person, or corporation, or other business organization, which are directed to the same business objective or to similar objectives in which the group has an interest. The scope of the term "enterprise" encompasses a single business entity as well as a unified business system which performs related activities for a common business purpose. What is a "common business purpose" in any particular case involves a practical judgment based on the facts in the light of the statutory provisions and the legislative intent. The answer ordinarily will be readily apparent from the facts. The facts may show that the activities are related to a single business objective or that they are so operated or controlled as to form a part of a unified business system which is directed to a single business objective. In such cases, it will follow that they are performed for a common business purpose. Where, however, the facts show that the activities are not performed as a part of such enterprise but for an entirely separate and unrelated business, they will be considered performed for a different business purpose and will not be a part of that enterprise. The application of these principles is considered in more detail in Part 776 of this chapter.

§ 779.241 Selling.

The statutory definition of the term "sale" or "sell" is quoted in § 779.15. As long as the employee in any way participates in the sale of the goods he will be considered to be "selling" the goods, whether he physically handles them or not. Thus, if the employee performs any work that, in a practical sense is an essential part of consummating the "sale" of the particular goods, he will be considered to be "selling" the goods. "Selling" goods, under section 3(s) has reference only to goods which "have been moved in or produced for commerce by any person," as discussed in §§ 779.242 and 779.243.

§ 779.320 Partial list of establishments whose sales or service may be recognized as retail.

Antique shops.
Auto courts.
Automobile dealers' establishments.
Automobile laundries.
Automobile repair shops.
Barber shops.
Beauty shops.
Bicycle shops.
Billiard parlors.
Book stores.
Bowling alleys.
Butcher shops.
Cafeterias.
Cemeteries.
China, glassware stores.
Cigar stores.
Clothing stores.
Coal yards.
Confectionery stores.
Crematories.
Dance halls.
Delicatessen stores.
Department stores.
Drapery stores.
Dress-suit rental establishments.
Drug stores.
Dry goods stores.
Embalming establishments.
Farm implement dealers.
Filling stations.
Floor covering stores.
Florists.
Funeral homes.
Fur repair and storage shops.
Fur shops.
Furniture stores.
Gift, novelty and souvenir shops.

AFFIDAVIT

STATE OF WISCONSIN)
)SS
COUNTY OF MILWAUKEE)

I, Robert Sadow,being duly sworn state:

1. I am the vice president of Finley Depertment,Inc. located in the Gimbels Departmnt Store at lol West Wisconsin Avenue.Finley Department, Inc. is a company that is engaged in the business of selling and repairing fine jewelry,Watches and similar items.I am responsible for and in charge of the operations of Finley,s including the hiring and fireing of personnel and determining wages for personnel. I have held this position at Finley,s for the past 27 years.

2. On March 14, 1972, I hired Mr. Banks while he was attending the Milwaukee Area Technical School (MATC) under a Wisconsin state manpower poverty program. (Mr.Banks, employment application is attached hereto as Exhibit 1.) Mr. Banks was employed as an apprentice jeweler

under a State of Wisconsin apprenticeship jeweler program, as set up by the State of Wisconsin Division of Apprenticeship and training.(A description of the apprenticeship program is attached as Exhibit 2.) Throughout Mr. Banks apprenticeship at Finley,s he was compensated in accordance with the salary schedule that was provided for inthe apprenticeship program.(See Exhibit 2).

3. Both watchmakers and jewelers work on a draw against commission earned between the two positions are different.This difference is due to inherent dissimiarities between the two positions, the amount of time spent on a given assignment,and most importantly,the cost of materails used to repair the item.Also,the jobs entirely different skills.

Because the cost of materails used in watch is relatively low,and because of the greater time it usually takes to repair a watch,payment based on a fixed percentage of the cost of repair is deemed the most efficient method of compensting watchmakers. Thus, watchmakers have been

paid on a one-third of the customer,s price of the watch,which price includes cost of materials and labor.In addition,the watchmaker, like the jeweler,must fully guarantee his work,that is, should the watch be returned to the watchmaker, the watchmaker must repair the watch free of charge and despite how long it takes him, he will not be compensated for it.(Special Projects)

On the other hand, with respect to jewelry repair, the cost of materials used is substantial and constitutes a substantial part of the customer,s bill.Unlike material used in watch repair,a jeweler uses precious jewels,such as diamonds, rubies, ect., and precious metal, such as gold,silver,etc., to repair jewelry.

Because of the substantial difference in the cost of materials used, it was (and is) not economically feasible nor equitable to pay jewelers on the same basis as it pays watchmakers. Therefore, Finley,s adopted a standard practice used in jewelery repair,which is the point system.

Under the point system, each type of jewelry repair is assigned a number of "points",for example, a ring sizing may be worth 4 points.As of December,1978, it was expected that a jeweler would be able to complete 12 points an hour, which was valued at $6.00.At this time, Mr.Banks averaged 18 points per hour,and thus, earned on the average of $ 9.00 per hour,plus $25.00 a week for filing parts.

4. Mr. Banks was not paid differently that the watchmakers because he was black.Mr. Banks was paid differently because he was a jeweler. Mr. Banks was paid the same way that Mr. James Doxtater,caucasion,and Ms. Pat Lewis,caucasian, the only other jewelers in the department,were paid.Mr. Banks, Mr. Doxtater,and Ms. Lewis went on the point system at the same time. It should be noted that Ms. Patricia Lewis commenced her employment with Finley,s on March 30,1970,two years before Mr. Banks was hired. She voluntarily terminated her employment on May 5, 1978 when she moved to Minnesota.Mr. James Doxtater commenced his employment in 1969.He left the

company on July 15, 1974.

5. Despite the difference in the methods of compensations between jewelers and watchmakers Mr. Banks earned more money outside of vacation pay than any of the watchmakers in the department in the period following Ms. Lewis, departure, June, 1978.Between June and November of 1978,Mr. Banks, who started in 1972,earned $8,890.00, whereas Mr.Dan Custigan, who started with the company in 1957, earned $8,134.99.The only other watchmaker during the whole period, Mr.Friederich who started with the company in 1965,earned $7,605.59.A copy of the commission report dated July,1977 through November, 1978 is attached hereto as Exhibit 3.It should be noted that even during the period from July, 1977 through May of 1978,when both Mr. Banks and Ms. Lewis were present,Mr.Banks still earned at times more money per month than several of the watchmakers.When Ms. Lewis departed, all of her work was given to Mr. Banks and the company did not hire another jeweler to replace her. Because jewelers

were paid on a piece-rate basis,Mr.Banks was able to substantially increase his salary.

6. At no time during Mr. Banks term of employmeny with Finley,s was he treated any differently than any other employee. In fact, Mr. Banks, if anything, was given special treatment. An example is when Mr. Banks was first hired,he had limited knowledge in mathmatics,specifically fractions, which made it very difficult for him to do engraveing work and for measuring gold. Accordingly, Mr.Banks was allowed to go back to MATC one day a week for a period of one year to attend a math course.During this time, he was paid for a fullweek,s work,including the day he attended school. After this course ended,Mr. Banks requested that he be allowed to continue attending technical school and he was permitted to do so at the expense of the company.No other employee was given this same opportunity nor treatment.

7. Contary to Mr. Banks assertion in his charge filed with the EEOC on or about April 3,

1980, Charge No. 055801396, Mr.Banks was not discharged from his position as jeweler.Mr. Banks Quit during a meeting that was held with Mr. Banks,Mr.Gary Freinik-Mr. Banks supervisor and myself. The meeting was held because Mr. Banks had refused to perform some repair work that had been given him by Mr.Freinik. I asked Mr. Banks that regardless of whoes error it was, he was to perform all repair work that was given him by Mr. Freinik.Mr.Banks became upset and stated that he was not going to do the job.I told him that he would have to do the job.He then stated he would quit and walk out.

8. At no time during this meeting was Mr. Banks being reprimended for refuseing to work on an assignment that was given to him by his supervisor.At no time during this meeting was Mr. Banks ask ed to perform a job that was not within his normal job duties.At no time during this meeting was Mr. Banks asked to do something that not required of all employees-Jewelers and watchmakers.At no time during this meeting was

Mr. Banks asked to resign. Mr. Banks was not terminated by the company. Rather, he voluntarily quit.

9. At no time, before or after November 28, 1978, when Mr. Banks filed his first charge with the EEOC, Charge No. 05579024-5, did the company treat him differently with respect to his terms and conditions of employment. Mr.Banks was never singled out and given "special jobs" As in the case of watchmakers,when a watch is given back tobe repaired again,the watchmaker must repair it at his cost. On March 28, Mr. Banks was given a repair order to do over again because the job was not done correctly,regardless of whose fault it was.Although it may be time consuming and without compensation, he was not given tha assignment because he is black.Rather he was given it because he was the jeweler who had worked on it previously.Mr. Banks race had absolutely nothing to do with his being given this "special" job.

Ihave read this affidavit consisting of 9 paragraphs and 5 pages and swear it is true to best of my belief. SIGN,

Robert Sadow

AFFIDAVIT

STATE OF WISCONSIN)
)SS
COUNTY OF MILWAUKEE)

I, Gerhard Freinik, being duly sworn state:

1. I was the manger of the Finley watch and jewelry repair department at Gimbels, located at 101 East Wisconsin Avenue, Milwaukee, Wisconsin Avenue, Milwaukee, Wisconsin from 1951 to July 19,1980. I an both a certified jeweler and watchmaker and am thoroughly fimilar with the duties,responsibility and compensation of both positions.

2. I was directly responsible for supervising all of the employees in my department, including jewelers Mr. Ira Banks, black,and Ms. Patricia Lewis, caucasion, who was hired March 30,1970, and Mr. James Doxtater, caucasion, who was hired in approximately 1969. Mr. Banks was hired by the company on March 14,1972,at the time he was attending school at the Milwaukee Area Technical College (MATC). He joined the

company as a jeweler apprentice, which he duly completed under my supervision and training. He was the first and only jeweler apprentice hired at the company. During Mr. Banks,period of employment, Mr. James Doxtater and Ms.Patricia Lewis was, outside of myself, the only other jeweler at Finley,s.

3. Empolyees in the jewelery department were paid on a "point system" basis, that is, each type of repair that is performed is given a certain number of points. In 1978, It was anticipated that a jeweler would earn 12 points per hour, or at a rate of $6.00 per hour.It should be noted that at one time both jewelers and watchmakers were paid on a percentage of customer,s price basis. In 1974, the cost of materaials used in watch repair became sudstantially inflated.It was therefore determined to put both jewelers and watchmakers on a point system basis - to seperate the cost of materaials from labor. The point system was bases on the normal hourly work performed by the

watchmaker and the jeweler.After approximately one year, the cost of watch repair materials stabilized, it was determined to put watchmakers on a 30% of customer price basis. The price of gold diamonds,rubies, ect.- material used in jewelry repair-were still greatly inflated and always fluctuating in price and, thus , the jewelers were kept on the point system.Mr.Banks Mr. Doxtater and Ms. Lewis, as jewelers were employed throughout the aforementioned changes in compensation systems. All three went on the system at the same time and remained on it until they left the company.

4. Jewelers were not paid on the same basis as watchmakers, because of the difference in materials that are used in the two positions, namely, the "materials" used in jewelry repair consist of preciors metal, such as gold,silver ect.And precious stones,such as diamonds, rubies, ect., are considerably more expensive then the mateaial used in watch repair.While the cost of material used in watch repair was under 10% of

the customer,s price, the cost of material used in jewelry repair could be as high as 99% of the customer,s price. Thus, putting jewelers on a percentage of the customer,s price was and is not economically feasible nor fair.The fact that Mr. Banks is black had nothing to do with the method by which he was paid and had everything to do with the fact he was a jeweler.

5. Notwithstanding the difference in the method of compensation, Mr. Banks, who commenced his employment in March,1972 as an apprentice and in 1975 as a fully qualified jeweler,earned more salary than did watchmakers who commenced their employment substantially earlier. In fact, several watchmakers had over 20 years of experience.

Between July, 1977 and May, 1978, Mr.Banks salary comparable to Ms.Lewis was able to repair more jewelry items than Mr.Banks.Both,however, were paid under the same point system formula. During this same period, Mr. Banks earned more compensation than James Greco and D. Brennan,

both of whom are watchmakers paid on 30% commission basis - and the comparable salary of A. Freiedsrich, watchmaker, all of whom had considerably more experience than Mr. Banks. (See Exhibit 1 for a detail account of the earnings of all employees in my department from july, 1977 to November, 1978.

Between the period of June, 1978 to November 1978, the period following Ms. Lewis, department from the company, Mr.Banks,earnings substantially increased. This was because all work that had been given to Ms. Lewis was transferred to him. During this period, Mr.Banks, salary surpassed A. Frederich and, on occasion ,D. Costigan. (See Exhibit 1.)

6. Both watchmakers and jewelers "guarantee" their work in the sense that if the repair in not to the satisfaction of the customer,the repair must be done over at the expense of the person doing the repair. That is, the repair is done free of charge reguardless of the time and effort involved.On or above March 14,1980,

Mr. Banks refused to accept special order and some repairs, partticularly one that involved a plate for a bracelet. A meeting was held with Mr. Sadow, the vice president of the company, on March 28,1980,to discuss Mr. Banks,refusal to repair the bracelet. At this meeting Mr. Banks became upset with the fact that Mr.Sadow had requested that he work on repairs,and he quit. at no time during the meeting nor at any time prior to the meeting did I or Mr.Sadow want to terminate Mr. Banks.

7. At no time during Mr.Banks employment at Finley was Mr. Banks treated any differently than any other employee under my supervision. in fact Mr. Banks was given a special benefit not given to other employees in that when Mr. Banks first came to Finleys, he was allowed to attend school at the expense of the company. The fact that Mr. Banks filed a charge of discrimination, charge No. 055801396,with the EEOC, had absolutely no effect on Mr. Banks, empolyment.Mr. Banks was not given any

different "special repair jobs" - jobs that are regularly given to jewelers and watchmakers as a normal part of their job - than he had received prior to the filing of his charge.

I have read the above affidavit consisting of 7 paragraphs and 4 pages and swear it is true to the best of my belief.

Signed,

_____
Gerhard Freinik

Signed and sworn to before me
this_____ day of may ,1982.

_____
Notary Public, Milwaukee County.
My Commission expires 9/16/84

COMMISSION REPORT(July 77 - Nov.78)(12-20-78)

Month	Watchmaker D.Costigan Start 7-8-58	Watchmaker A.Friedrich Start 1-11-65	Watchmaker D.Brennen Stert 5-31-77	Watch-Maker GRECO Jim Start 10-18-65
July 77	$575.00 + vac.	$475.50 + vac	$375.50	$143.00 Ill.
Aug.77	$1535.00	$1080.00	$658.50	$236.50
Sept.77	$1346.50	$649.00	$809.50	Ill
Oct. 77	$1480.25	$1084.50	$801.00	"
Nov. 77	$1434.50	$1138.50	$745.00	"
Dec. 77	$1358.50	$1304.00	$642.00	$88.00
Jan. 78	$1383.50	$990.50	$660.00	$308.50
Feb. 78	$1462.00	$1129.50	$369.00	$850.50
Mar. 78	1514.95	$1282	$760.47	$392.33
April78	$1665.73 $1645.63	$1343.98 $1451.66	$620.97 $813.74	$430.15 $226.91
May 78	$142.63	$1398.52	$785.30	$337.87
TOTAL	$16829.18	$13327.89	$8040.48	$3014.26
Jun. 78	$1247.26 + vac	$1260.11	$743.99	Ill
Jul. 78	$1521.61	$950.26	$563.26	Ill
Aug 78	$1431.95 + vac	$1525.81	$662.06	Retired

COMMISSION REPORT (July 77 - Nov. 78)(12-20-78)

Month	Watchmaker D.Costigan Start 7-8-58	Watchmaker A.Friedrich Start 1-11-65	Watchmaker D.Brennen Start 5-31-77	Watch-maker GRECO Jim Start 10-18-65
Sept.78	$1563.51 + vac	$1557.05	Exit	
Oct. 78	$702.23 + vac	$869.05		
Nov. 78	$1668.37	$1143.31		
6 Month total 4 Weeks vac pay	$8134.99 $1524	$7605.59		vac. Pay

Record 19 & 20 Exhibit 1 or 3 (Respondent Submitted Commission Report Of Watch makers employees).

COMMISSION REPORT (July 77 - Nov.78)(12-20-78)
Robert Sadow and G.Freinik

Month	Jewelry Repair I. Banks Start 3-14-72	Jewelry Repair P. Lewis Start 4-21-69	Mr. Banks Start 3-14-72 as Apprentice
July 77	$1030.50	$844.25 + vac.	
Aug. 77	$792.50	$879.50	
Sept.77	$733.50	$981.00	
Oct. 77	$618.50	$1125.50	
Nov. 77	$1003.00	$1061.00	
Dec. 77	$1013.00	$1006.00	Fine jewelry repair short of work.
Jan. 78	$930.50	$1168.00	
Feb 78	$1032.50	$1211.50	
Mar. 78	$958.00	$1037.50	
April 78	$1100.00 $918.50	$837.50 $946.50	2 Commission Checks
May 78	$183.00 + vac	$1170.00	
TOTAL	$10321.35	$12,268.25	
Jun. 78	$1567.00	Exit of Mrs. Lewis Now full time work for Mr. Banks.	
Jul. 78	$1229.00		

COMMISSION REPORT (July 77 - Nov. 78)(12-20-78)
Robert Sadow and Gerhard Freinik

Month	Jewelry Repair I. Banks Start 3-14-72
Aug. 78	$2115.00
Sept.78	$1445.00
Oct. 78	$1266.50 Plus $100 bonus equal $1366.50 ($25.00 Each week)
Nov. 78	$1092.50 Plus vacation pay $75.00 ($25.00 each week for filing and estimating).
Total	$1167.50
Total for 6 months	$8,8900.00

Record 19 & 20 Exhibit 1 or 3 (Respondent Submitted Commission report Of Jewelery Employees).

AFFIDAVIT

STATE OF WISCONSIN) SUBMISSION OF
) PRO-SAY BY PLAINTIFF
COUNTY OF MILWAUKEE)
)

Ira Banks ,affidavit in part.Record 23 page 4.

I, Ira Banks, being duly sworn state:

Stated by Mr. Gerhard Freinik and Mr. Robert Sadow that the plaintiff refused to make some repairs. (Freinik Affidavit,paragraph #6 and Sadow Affidavit, Paragraph # 7 and 8).The plaintiff did not refuse any assignments for repairs. The repair of the bracelet referred to by Mr. Gerhard Freinik(Freinik Affidavit, Paragraph # 6) was repaired by the plaintiff. The plaintiff did not refuse to repair such bracelet.

After repairs had been made by the plaintiff on the bracelet,the defendant did not compensate the plaintiff for such repairs. Noy only was the plaintiff not compensated for this particular repairs but others as well. When the plantiff requested to be compensated by the defendant the plaintiff was terminated by the defendant.

I, Ira Banks,plaintiff, request that the courts review all ststements in the affidavits of Robert Sadow, Wesley N. Harry , Patricia Lewis, and Gerhard Freinik, as inaccurate.

Ira Banks

Ira Banks

Dated This 12thDay Of July1982

Notary Public In And For The State Of Wisconsin

Residing In Milwaukee County

My Commission Expires March, 30 198

A explanation of proceeding pages 44a,b,& c. are work production sheets used each week by petitioner as a employee of respondent.This example of the amount of commission should have been paid to petitioner for his work during the week 7-27-74.As opposed to what was paid to petitioner for his work during 7-27-74.The example production sheet were used from 1974 through March 28,1980.

THIS DOCUMENT IS EVIDENTIARY HEARING EXHIBIT 6,HELD IN THIS CASE ON THIS DATE,JAN. 10,1985.

Page 44a and 44b,is information supplyed by the employee to the employer after the repair was done.Production sheet week 7-27-74 have a total of 31 repairs that week.

Reading from left to right.HORIZONTAL

The first colum is the inital of customer name who,s jewelry being repaired by the jeweler.

The second column is the numbers of the job repair envelop.(refer to J.A.21 for example.

The third column is the number of points paid to petitioner(employee).

The fourth column is the retail prices respondent charged each of its customers for serviceing the jewelry repair ect.

Week ending or Month: 7-27-7

Work Category: Fine Jewelry

Shop			CC			SR	NR /	MF		

Shop | CC | SR | NR | MF

Month: 1-21-14

MF
L 44456 5 13.00
13 44633 16 2.00
Sharp pieces 9
13 44337 15 2.50
Pickup 1.21
SALES 1.21 7.50
NSF 2.50

7 12.50

47

60

VF | ET | AP | PP

VF
SW 4 7.50

AP
C 5176 2 3.00
" 5184 7 12.50
P 5157 5 7.50
W 5134 7 12.50
A 5194 16 17.50
S 5191 5 6.50
N 5202 4 7.50

PP
Plating 81 [illegible]
45 x 3 = 81 144
[illegible] x 3 = 44.64
Polish 7.14
31 x 45 = 1455
44.64
Hang
B 34.52

4 | 7.50 | 46 | 7.00 =

E | AP | HD

E
C [illegible] 4 0.00 =

AP
[illegible] 14 2.00
[illegible] 3 4.00
[illegible] 2.00

4
15.00

Point Cut 1.00

12.00
2.00
357 x .48 = 171.36

HD
Total 1.00 1.31

Total Rush Pick Charge
140.00
702.00
842.64

30% OF 8426.5 = 2611.4

(446)

// 171.3 # 2267.79 IS 6558 96.63
83.10 405 + 96.63
Pickup 57.52

1-21-14

Jobs - 31

Ref 942.65

Units - 357

Com - 10665

357 x $166.65

Short $54.00

454 x 357 = 166.65

FINE JEWELRY REPAIR

RING SIZING	Pts.	Retail
up to 2½ mm		
Ladies gold or silver	4	$ 6.50
each additional size	1	$ 1.60
Ladies Platinum	6	$ 9.00
each additional size	2	$ 3.50
Gents gold or silver	5	$ 8.00
each additional size	2	$ 2.50
Solder (2) Rings together	5	$ 8.50
NEW SHANK		
Ladies 14K gold 2DWT	11	$ 34.50
Gents 14K gold 4DWT	15	$ 62.50 and up
Finger fit shank 2½ mm	12	$ 67.50
Finger Mate shank 2½ mm	18	$ 135.00
Knobs inside ring (2)	9	$ 25.00
Spring inside ring	12	$ 35.00
FINISHES (Rings only)		
Brush finish (No chg. w/sizing)	3	$ 3.50
Polishing " " " "	1	$ 2.50
Rhodium " " " "	3	$ 4.50
Gold Plate " " " "	3	$ 4.50
Antiquing	2	$ 3.50

Revised Jan 1974 (45)

FINE JEWELRY REPAIR

DIAMOND SETTING	Pts.	Retail
Melee up to 8 pts.	3	$ 4.75
9pts. to 1/4 ct.	5	$ 8.50
to 1/2 ct.	7	$ 12.50
to 1 ct.	9	$ 16.50
Each additional 1/4 ct.	2	$ 3.50
SET STONE GENERAL	4	$ 6.50
TIGHTEN STONE EACH	2	$ 3.75
NEW BEZEL INSTALLED UP TO 7x9	6	$ 21.00
8 x 10 and larger	6	$ 2500
SET STONE INTO BEZEL UP TO 7x9	6	$ 6.50
8 x 10 and larger	8	$ 8.75
NEW HEAD INSTALLED UP TO 8 pts.	3	$ 8.25
9 pts. to 1/4 ct.	3	$ 16.25
to 1/2 ct.	4	$ 20.75
to 1 ct.	5	$ 26.75

Over 1 ct. call for estimate

CENTER HEAD INSTALLED INTO RING

1/4 ct.	6	$ 22.00
1/2 ct.	7	$ 26.50
1 ct.	8	$ 32.50

FINE JEWELRY REPAIR

	Pts.	Retail
CEMENT PEARLS ON POSTS.....	2	$ 3.50
SET PEARL IN PRONGED HEAD.....	3	$ 4.75
TIGHTEN PEARL IN PRONGED HEAD....	2	$ 3.75
POST REPLACED FOR PEARL.....	4	$ 6.50
PRONGS REBUILT FIRST.....	5	$ 7.00
each additional prong.....	3	$ 4.00
REBUILD LUGS EACH.....	8	$ 8.75
SHORTEN GOLD MESH BAND EACH SIDE.	3	$ 8.50
DRILL PERAL.....	2	$ 3.50
Drill Onyx.....	5	$ 5.50
General Gold Soldering	4	$ 6.50
Gold colder jump ring(charms)...	3	$ 3.75
Tube for Diamond plate.....	8	$ 11.50
Diamond Plate.....	1	$ 12.50
Genunine Stones Call for estimate		
EARRING BACKS " " "		
CUFF LINK BACKS " " "		
PIN BACKS " " "		
CHAINS GOLD SOLDERED	4	$ 6.50
MASH BANDEACH SIDE	12	$ 21.50
GOLD SOLDERE HOLES IN WATCH CASE.	3	$ 3.50

REVISED JAN. 1974 (47)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

IRA BANKS

PETITIONER

v.

FINLEY-SELIGMAN & LATZ, INC.,

RESPONDENT

PROOF OF SERVICE

The undersigned hereby certifies that copies of motion petition for writ or Certiorari to the Court Of Appeals For The Seventh Circuit on counsel for respondent by encloseing copys thereof in an envelop.First Class postage pre-paid, Address to

Barry L. Chaet
Kroukoski & Associates, S.C.
7111 West Edgerton Avenue
Milwaukee, WI 53220

and depositing same in the United States Mail at Milwaukee, WI .On this 15 Date of March

Ira Banks

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

IRA BANKS

PETITIONER

v.

FINLEY-SELIGMAN & LATZ, INC.,

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7111 West Edgerton Avenue
Milwaukee, WI 53220

and depositing same in the United States Mail at Milwaukee, WI .On this 10 Date of ~~March~~ April

Ira Banks

Ira Banks

Supreme Court, U.S.
FILED
JUN 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1854 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IRA BANKS,

Petitioner,

v.

FINLEY-SELIGMAN & LATZ, INC.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Thomas P. Krukowski
Barry L. Chaet*
Laurie A. Petersen
KRUKOWSKI, CHAET,
BECK & LOOMIS, S.C.
7111 West Edgerton Avenue
Milwaukee, Wisconsin 53220
(414) 423-1330

Counsel for Respondent

*Counsel of Record

QUESTIONS PRESENTED

1. Whether the Petitioner's filing on November 26, 1985, of a Petition for Writ of Certiorari from an order of the Seventh Circuit Court of Appeals dated October 29, 1984, affirming a grant of summary judgment of the District Court for the Eastern District of Wisconsin dismissing Petitioner's claim of race discrimination due to the method of calculating compensation under 42 U.S.C. §2000e-2 is timely.

2. Whether the Seventh Circuit properly determined that the evidence received at the hearing on remand in District Court supported the District Court's finding that the Employer did not, in violation of 42 U.S.C. §2000e-3, discharge the Petitioner in retaliation for filing a Complaint with the Equal Employment Opportunity Commission, hereinafter "EEOC," for race discrimination.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Ira Banks, and the Respondent, Finley, a Division of Seligman & Latz, Inc.

Seligman & Latz, Inc. is a general partner in Seligman & Latz Acquisition Company, L.P., a Delaware limited partnership. Goldome Savings Bank and American Savings Bank F.S.B. are limited partners.

Finley is a Division of Seligman & Latz Acquisition Company, L.P.

Seligman & Latz Acquisition Company, L.P. has various subsidiaries in the beauty business in Canada, Mexico and Puerto Rico. Seligman & Latz Acquisition Company, L.P. has various non-operatings name-holder subsidiaries.

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No. 85-1854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IRA BANKS,

Petitioner,

v.

FINLEY-SELIGMAN & LATZ, INC.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Finley-Seligman & Latz, Inc., respectfully prays that a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on September 4, 1985 and denied for rehearing on September 26, 1985 be denied.

OPINIONS BELOW

None of the opinions of the District Court or the Court of Appeals are published. They are included for the Court's review in Respondent's Appendix, hereinafter "Resp. App."

The District Court for the Eastern District of Wisconsin granted summary judgment on October 13, 1983 in Case No. 80-C-1056 (Resp. App. 1-5.) On October 29, 1984, Case No. 83-2981, the United States Court of Appeals for the Seventh Circuit affirmed in part and reversed and remanded in part the grant of summary judgment from the District Court. The Court of Appeals affirmed the dismissal of the race discrimination (wages) claim based on 42 U.S.C. §2000e-2 and 42 U.S.C. §1981. The Court remanded Petitioner's retaliation (discharge) claim based on 42 U.S.C. §2000e-3 for further proceedings. (Resp. App. 6-9.)

On January 10, 1985, the District Court on remand entered a decision finding that the Plaintiff was not discharged in retaliation for filing a prior Complaint with the EEOC, Case No. 85-C-1056. (Resp. App. 10.) The Seventh Circuit affirmed the decision of the District Court in Case No. 85-1188 on September 4, 1985. (Resp. App. 11-16.) A Motion for Rehearing was denied on September 26, 1985. (Resp. App. 17.)

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. §§1981, 2000e-2 and 2000e-3, the Petitioner brought suit against his former employer, Finley-Seligman & Latz, Inc. in the Eastern District of Wisconsin. On October 13, 1983, the District Court granted Defendant's Motion for Summary Judgment on all claims.

Petitioner appealed to the United States Court of Appeals for the Seventh Circuit on November 7, 1983 and on October 29, 1984, the Seventh Circuit affirmed the District Court's dismissal of Petitioner's racial discrimination (wages) claim finding the Respondent did not violate 42

U.S.C. §§1981 and 2000e-2 of Title VII of the Civil Rights Act of 1964, as amended. However, the Seventh Circuit reversed and remanded the District Court's grant of summary judgment on the retaliation (discharge) claim on the grounds that Petitioner's counter-affidavits "raised disputed issues of fact that are material to the disposition of his retaliation claim."

On January 10, 1985, the District Court held a day long evidentiary hearing in accordance with the decision of the Seventh Circuit. After hearing testimony from both parties, the Court entered judgment for the Respondent finding that the Petitioner was not discharged in retaliation for filing a prior Complaint with the EEOC.

Petitioner appealed the District Court's decision on remand to the Seventh Circuit which affirmed the judgment on September 4, 1985. The Petitioner sought rehearing from the Seventh Circuit which all judges on the panel voted to deny on September 26, 1985. A Petition for Writ of Certiorari was docketed by the United States Supreme Court on November 26, 1985 requesting review of the September 4, 1985 decision of the Seventh Circuit - the retaliation (discharge) claim.

Petitioner's attempt to have this Court grant a Writ of Certiorari to review allegations of race discrimination (wages) is untimely. The decision of the Seventh Circuit to which this writ is addressed affirmed a judgment by the District Court on remand finding the Respondent-Employer did not discharge the Petitioner in retaliation for filing an EEOC charge. (Resp. App. 11-16.) The Seventh Circuit did not address a claim of race discrimination (wages) in its September 4, 1985 decision, nor was such a claim before the District Court on remand because the Seventh Circuit had affirmed the District Court's original dismissal of the claim on October 29, 1984. (Resp. App.6-9.) Petitioner did not appeal the October 29, 1984 decision of the Seventh Circuit affirming the dismissal of the race discrimination (wages) claim.

To be timely, a petition must be applied for within 90

days from the date the Order was entered. 28 U.S.C. §2101(c). A Petition for Certiorari regarding Petitioner's race discrimination (wages) was not applied for until November 26, 1985, well over 90 days from the date of judgment, therefore his petition as to this issue is untimely.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

The relevant statutes and rules involved are as follows:

Statutes:

28 U.S.C. §1254(1)

> **§1254. Courts of appeals; certiorari; appeal; certified questions**
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. §2101(c)

> **§2101. Supreme Court; time for appeal or certiorari; docketing stay**
>
> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

42 U.S.C. §2000e-3

§2000e-3. Other unlawful employment practices

(a) Discrimination on account of opposition to unlawful practices or participation in investigation, proceeding, or hearing. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [42 USCS §§2000e-2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 USCS §§2000e-2000e-17].

Rules:

Supreme Court Rule 17. Considerations Governing Review on Certiorari.

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has

rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

2.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the United States Court of Appeals for the Federal Circuit, the United States Court of Military Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

STATEMENT OF THE CASE

Finley-Seligman & Latz, Inc., the Respondent herein, is engaged in the business of selling and repairing fine jewelry, watches and similar items. The Respondent employed individuals as jewelers and watchmakers who performed substantially different functions and duties.

Petitioner, Ira Banks, was hired by Respondent as a jeweler in 1972. On November 28, 1978, Petitioner filed a

discrimination claim against Respondent with the EEOC alleging that Respondent's pay system was discriminatory because it caused him to be paid less than certain white employees. Petitioner left Respondent's employment 16 months later on March 28, 1980. At that time, he filed a second discrimination claim with the EEOC alleging that he had been discharged in retaliation for protected Title VII activity. After receiving "right-to-sue" letters from the EEOC on the two separate charges, Petitioner brought suit against his former employer in the Eastern District of Wisconsin raising both claims.

On October 13, 1983, the District Court granted summary judgment holding that Respondent's decision not to compensate Petitioner, jeweler, in the same manner as watchmakers, was supported by a valid business purpose and was not discriminatory. The District Court also granted summary judgment on the Petitioner's second claim that he was terminated from his employment in retaliation for filing the race discrimination charge with the EEOC. (Resp. App. 1-5.) By Order dated October 29, 1984, the Seventh Circuit Court of Appeals affirmed the District Court's grant of summary judgment on the racial discrimination (wages) claim and on the 42 U.S.C. §1981 claim but reversed and remanded the retaliation (discharge) claim. The Court found that the Affidavits of the Respondent in this case and the Petitioner's counter-affidavit raised disputed issues of fact that are material to the disposition of the retaliation (discharge) claim. In light of this factual dispute, the Court remanded back to the District Court for further proceedings. (Resp. App. 6-9.)

On January 10, 1985 the District Court held a full evidentiary hearing in accordance with the decision of the Seventh Circuit. After hearing testimony from both parties, the Court entered judgment finding the Petitioner was not discharged in retaliation for filing a prior Complaint with the EEOC. (Resp. App. 10.)

The Seventh Circuit, on September 4, 1985, affirmed this decision finding ample evidence in the record which sup-

ported the District Court's finding. (Resp. App. 14-16.)[1] The Court found that the case hinged on a question of credibility which it was hesitant to second-guess on appeal absent clear error. [See *Anderson v. City of Bessemer City,* 105 S. Ct. 1504, 1512-13 (1985).]

The Court carefully examined the record and construed Petitioner's *pro se* briefs liberally, proceeding step-by-step to determine whether Petitioner established a *prima facie* case consistent with *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), whether there was evidence of a legitimate business reason and whether the business reasons were not a mere pretext. On November 26, 1985, Petitioner applied for Certiorari.

SUMMARY OF ARGUMENT

The Supreme Court should deny Petitioner's Petition for Writ of Certiorari. Any attempt by Petitioner to have this court review the dismissal of his race discrimination claim (wages) is untimely. The final judgment on that claim was rendered by the Seventh Circuit on October 29, 1984, but a Petition for Certiorari was not applied for until November 26, 1985. This is well past the 90 day time limitations of 28 U.S.C. §2101(c).

The remaining issues which Petitioner raises in his Petition for Writ of Certiorari present none of the important factors or considerations viewed by the Court as a basis for granting certiorari.

---

[1]The District Court based its dismissal on a finding that there was no record that any retribution was ever taken against the Petitioner during the 16 month period he worked for Respondent following the filing of the first EEOC Complaint. The Court further held the evidence clearly demonstrated that on March 28, 1980, the Petitioner was not discharged but rather "walked off the job" after being given the opportunity to perform work he had refused to perform before. Petitioner himself was unable to point to other instances of harassment or discrimination arising from the initial EEOC charge. (Resp. App. 11-16.)

There is no conflict in decision between courts or a conflict with the manner in which the Seventh Circuit decided this case and the manner in which this Court itself would decide the case. In fact, the Seventh Circuit followed the standards and precedent of this Court.

None of the questions presented by Petitioner are of importance to the public in general. The questions involve only concerns applied to this discreet set of facts. Not only are the issues not of broad and general importance, but also the Petitioner is attempting to have this Court make an independent determination of credibility of witnesses and of the proper interpretation of given facts as they apply to this particular situation. A determination well within the expertise of the Seventh Circuit and the District Court and not important enough to waste this Court's time on.

Therefore, the Respondent, Finley-Seligman & Latz, Inc., respectfully prays that this Petition for Writ of Certiorari be denied.

REASONS FOR DENYING THE WRIT

I. *PETITIONER'S PETITION FOR WRIT OF CERTIORARI ON RACE DISCRIMINATION (WAGES) CLAIM IS UNTIMELY.*

As challenged in the Jurisdiction Statement, Petitioner's attempt to have the Court grant a Writ of Certiorari to review allegations of race discrimination (wages) is untimely. This issue was finally disposed of by the Seventh Circuit on October 29, 1984 when it affirmed the District Court's grant of summary judgment. The time for petitioning this court would have run on January 27, 1985. Petitioner did not petition this Court for Certiorari until November 26, 1985.

II. *NONE OF THE CONSIDERATIONS VIEWED BY THE COURT IN RULE 17 AS A BASIS FOR GRANTING CERTIORARI WILL BE ADVANCED BY GRANTING THIS PETITION.*

Supreme Court Rule 17 makes it clear that a review on Writ of Certiorari is not a matter of right, but a matter of judicial discretion and will be granted only when there are special and important reasons for granting such. The rule enumerates some general categories which, while not exhaustive, indicate the "character of reasons that will be considered."

One of the first factors the Court looks to in granting the Petition is whether or not there is a conflict in decision between courts or a conflict with a Supreme Court decision. The Petitioner fails to point out any conflict in the decisions of different courts and Respondent has itself failed to find any.

Each time the Seventh Circuit considered the Title VII claims of Petitioner, it applied the same standards to its resolution of the Title VII issues as followed by all other courts, both state and federal, and as clearly enunciated by this Court in *Griggs v. Duke Power Company,* 401 U.S. 424, 429-430 (1971). [See also *McDonnell Douglas,* 411 U.S. 792 cited by the Seventh Circuit Court of Appeals in its September 4, 1985 Order.]

Another purpose for which the United States Supreme Court grants writ is to settle questions which are of importance to the public in general as distinguished from just the parties involved. *NLRB v. Pittsburgh Steamship Company,* 340 U.S. 498, 502 (1951). The facts of this case are not sufficiently of general importance to warrant a grant of certiorari by the United States Supreme Court. The rules applied by the Seventh Circuit in this case were standards developed by the United States Supreme Court itself and applied to the unique, particular fact situation involved. The standards were applied to this case consistent with the manner in which the United States Supreme Court itself would have

applied the standards. Where an issue concerns only a particular order as applied to a discrete set of facts the case does not merit the Court's grant of a Petition for Certiorari. *United States v. ITT Continental Baking Company,* 420 U.S. 223, 227 (1975).

III. *PETITIONER SEEKS REVIEW OF A SEVENTH CIRCUIT DECISION WHICH TURNS SOLELY UPON AN ANALYSIS OF THE PARTICULAR FACTS INVOLVED AND AS SUCH IS NOT PROPER FOR A GRANT OF CERTIORARI.*

The Supreme Court has held that it will usually deny certiorari when a review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved. They will not grant certiorari to review evidence and discuss specific facts. *United States v. Johnston,* 268 U.S. 220, 227 (1925). The Court has stated it is even less likely to grant a petition to review a factual issue where the findings of fact made by the District Court have received the concurrence of the Court of Appeals. "[A] court of law, such as this court is, rather than a court for correction of errors and fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Manufacturing Company v. Lind Company,* 336 U.S. 271, 275 (1949).

> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's orders unsubstantiated. In such situations we should 'adhere to the usual rule of noninterference where conclusions of Circuit

> Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' [Citation omitted.] *NLRB v. Pittsburgh Steamship Company,* 340 U.S. at 503.

This case is such a case which turns upon an observation and interpretation of the particular given facts. The Seventh Circuit Court of Appeals itself in its September 4, 1985 order held:

> Basically this case hinges on a question of credibility which we are hesitant to second-guess on appeal absent clear error. *Anderson v. City of Bessemer,* _____ U.S. _____, 105 S.Ct. 1504, 1512-13 (1985); *In re Lemmon & Company, Inc.,* 742 F.2d 1064, 1070 (7th Cir. 1984); *Luedtke Engineering Company v. Industrial Lime Stone Company,* 740 F.2d 598, 601 (7th Cir. 1984); *Walsh v. Brewer,* 733 F.2d 473, 477 (7th Cir. 1984).

Ample evidence supported the District Court's determination that Banks was not discharged in retaliation for filing a discrimination claim. Sixteen months passed between the time that Banks filed his discrimination claim and his subsequent termination of employment with the Defendant. Banks himself was unable to point to overt instances of harrassment or discrimination arising from the discrimination charge which he filed. [Footnote omitted.] Although Banks testified that Sadow fired him in retaliation for filing the claim, both Sadow and Frenik testified otherwise. As such, the Seventh Circuit agreed with the District Court that Banks failed to establish that he was terminated in retaliation for filing a discrimination claim against the Defendant. (Resp. App. 14-16.)

IV. *PETITIONER HAS BEEN GIVEN THE OPPORTUNITY OVER THE PAST SIX YEARS TO FULLY LITIGATE HIS CLAIMS AGAINST THE RESPONDENT.*

Throughout the past six years, Petitioner has been given a chance to litigate his claim extensively and repeatedly in front of a number of tribunals. By the records established in each of these forums, it is obvious that Petitioner's claims were not lightly brushed aside.

The litigation of Petitioner's claims began on November 28, 1978 when Petitioner filed his first race discrimination claim relating to methods of payment with the EEOC. Sixteen months later, on or about March 28, 1980, Petitioner left Respondent's employment and filed his second discrimination claim with the EEOC alleging retaliation. The EEOC issued "right-to-sue" letters on each of the two separate charges.

On or about November 24, 1980, Petitioner filed his first *pro se* Complaint with the District Court. The pleadings were revised and amended and ultimately all claims were dismissed on October 13, 1983 by summary judgment.

On October 29, 1984 the United States Court of Appeals for the Seventh Circuit affirmed in part the decision of the District Court and reversed and remanded in part. The portion of the District Court's decision which the Seventh Circuit affirmed held that the Respondent did not engage in racial discrimination with regard to Petitioner's compensation and that they did not violate 42 U.S.C. §1981 of Title VII of the Civil Rights Act of 1964, as amended. More specifically, the Seventh Circuit found in its decision that the Petitioner failed to establish a *prima facie* case of discrimination. The Court found that the Petitioner failed to establish any disparate impact on minority group members of the facially neutral employment standard of Respondent. But, as to the retaliation claim, the Seventh Circuit held that the Affidavits of Respondent and the countering Affidavits of Petitioner established a factual dispute a reso-

lution of which could only be had by additional hearings. Consequently, the Seventh Circuit remanded the retaliation claim for further proceedings consistent with its opinion.

A full hearing was held on January 10, 1985 with testimony taken from both sides and the District Court rendered a decision for Respondent. Petitioner again appealed to the Seventh Circuit. After a thorough examination of the record, the Seventh Circuit affirmed.

The facts have been repeatedly reviewed and evaluated. The Courts have given Petitioner every opportunity to establish his case. In fact, during the hearing in District Court, Judge Reynolds attempted to help Petitioner present the necessary evidence. There was simply no evidence of retaliatory discharge to be had.

CONCLUSION

The issue of retaliatory discharge has been considered twice by the District Court for the Eastern District of Wisconsin and twice by the Seventh Circuit Court of Appeals. The District Court held a full hearing on the issue and gave the Petitioner every opportunity possible to present sufficient evidence to sustain his case. No such sufficient factual basis was forthcoming.

Likewise, the Seventh Circuit carefully examined the record on appeal and determined the issue was one of credibility and found ample evidence in the record to uphold the decision of the District Court.

The Petitioner is not asking this Court to resolve a conflict of decision between courts, neither is he asking this Court to resolve an issue of importance to the public in general. What Petitioner is asking this Court to do is substitute its judgment as to the credibility and sufficiency of evidence as it applies to a unique factual situation — a private dispute affecting only two parties.

The questions which Petitioner seeks to present to this

Court are not in the nature of those which the Court itself has deemed important enough for its consideration. As such, Respondent respectfully requests Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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(4)

Supreme Court, U.S.
FILED
JUN 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IRA BANKS,

Petitioner,

v.

FINLEY-SELIGMAN & LATZ, INC.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S APPENDIX

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1986

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

IRA BANKS, Plaintiff,

v.

FINLEY-SELIGMAN & LATZ, INC., Defendant

DECISION AND ORDER C.A. No. 80-C-1056

This is an action for job reinstatement and front and back pay under 42 U.S.C. §§ 1981 and 2000e-5(f). Jurisdiction is predicated on 28 U.S.C. § 1343 and 42 U.S.C. § 2000e-5(f)(3). The plaintiff, formerly a jeweler in the defendant's employ, alleges in his second amended complaint that the defendant engaged in racially discriminatory employment tactics directed against him. It appears from the pleadings that the jurisdictional prerequisites to the claim under § 2000-5(f)(3) are satisfied. The defendant has moved for summary judgment. The motion is granted.

In March, 1972 the defendant hired plaintiff as an apprentice jeweler pursuant to Wisconsin's Apprentice Jeweler Program. Plaintiff was initially compensated in accordance with the salary schedule in that program. In December, 1974, plaintiff completed the program and became a fully qualified jeweler. He remained in defendant's employ and, like the two other nonmanagement jewelers employed by defendant, was paid on a "point system" —— a system awarding a certain number of points to a particular repair task. This method of compensation contrasts with the method by which defendant's watchmakers were compensated: the watchmakers received a percentage of the consumer price of their work. This difference in compensation formula generally

resulted in lower pay for the jewelers, although defendant affies that for a time, plaintiff actually earned more than certain watchmakers. In any event, the discrepancy prompted plaintiff to file a charge of employment discrimination with the Equal Employment Opportunity Commission ("EEOC"). While that charge was pending, plaintiff voluntarily terminated his employment with defendant. In September, 1980, the EEOC determined that there was no reasonable cause to believe that plaintiff had been discriminated against, and mailed him his Right-to-Sue letter. This suit was filed shortly thereafter.

The second amended complaint alleges racially discriminatory employment tactics in violation of 42 U.S.C. §§ 1981 and 2000e-2a. Although this latest complaint does not set forth the specific acts forming the basis of the alleged statutory violations, prior and subsequent pleadings filed by this pro se plaintiff indicate that the unequal compensation of jewelers and watchmakers is the subject of this action. Therefore, I treat the second count of the second amended complaint as arising under 42 U.S.C. § 2000e-2(a)(1), which, prohibits employment discrimination in respect to compensation.

In order to establish a prima facie case under § 1981, plaintiff must establish that he is a member of a racial minority and that he was unable to engage in or enjoy one of the statutorily enumerated activities or benefits due to the alleged discriminatory action. Additionally, he must show that the defendant's discrimination was intentional. *General Building Contractors v. Pennsylvania,* 50 U.S.L.W. 4975 (U.S. June 29, 1982). The elements of a prima facie case of racial discrimination with respect to wages are not clearly established, although a variant of the familiar four-part test of *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792, 803 (1973), would be appropriate. *Compare, Meyer v. Missouri State Highway Comm'n,* 567 F.2d 804 (8th Cir. 1977), *cert. denied,* 435 U.S. 1013 (1978) (discrimination in promotion and relocation). Upon a prima facie showing, the burden shifts to the employer to articulate a legitimate rationale

for the challenged action.

Similarly, in a disparate treatment case under Title VII, the plaintiff must establish that defendant acted with discriminatory animus. This can be inferred from a prima facie showing under *McDonnell-Douglas.* Again, when plaintiff establishes a prima facie case, the burden shifts to defendant to articulate a legitimate rationale for the challenged action. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

In this case, the defendant has carried its burden of establishing that its decision not to compensate plaintiff in the same manner as watchmakers was supported by a valid business purpose. The defendant has submitted affidavits tending to show that the positions of watchmaker and jeweler involve distinct skills and responsibilities. Moreover, as defendant has contended, the prices of jewelry materials fluctuate while the prices of watch components remain relatively constant, and the cost of jewelry can sometimes rise as high as ninety-nine percent of the consumer price. Thus, it would be unfeasible to compensate jewelers on the same basis as watchmakers.

Plaintiff does not challenge these assertions, but argues simply that watches, like all the items sold and serviced by the defendant, are jewels and therefore there is no legitimate basis for the watchmaker/jeweler categorization. The argument is too formalistic to be maintained, particularly in the face of defendant's business justification. Moreover, plaintiff's suggestion that the distinction in compensation rests not upon job responsibilities but upon race is squarely rebutted by defendant's showing that it employed two caucasians during plaintiff's term of employ, both of whom were compensated on the jeweler's scale.

The Court has reviewed the remaining allegations in the sundry pleadings and documents and finds them to be either unmeritorious or irrelevant. Because defendant has adequately carried its burden of proof, I conclude that it is entitled to judgment as a matter of law. *See Kephart v. Institute of Gas Technology,* 630 F.2d 1217, 1219-20 (7th Cir. 1980).

THEREFORE, IT IS ORDERED that defendant's motion for summary judgment is granted.

Dated at Milwaukee, Wisconsin, this 13th day of Oct., 1983.

BY THE COURT:

John W. Reynolds
Chief U.S. District Judge

U.S. District Court East Dist. Wisc.
FILED
OCT 13, 1983
SOFRON B. NEDILSKY
CLERK

JUDGMENT ON DECISION BY THE COURT
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF WISCONSIN

IRA BANKS,

v.

FINLEY-SELIGMAN & LATZ, INC.

CIVIL ACTION FILE No. 80-C-1056

This action came on for (hearing) before the Court, Honorable JOHN W. REYNOLDS, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered, granting defendant's motion for summary judgment. It is Ordered and Adjudged that this action is hereby dismissed.

Dated at Milwaukee, Wisconsin, this 13th day of October, 1983.

U.S. District Court East Dist. Wisc.
FILED
OCT 13, 1983
SOFRON B. NEDILSKY
CLERK

UNITED STATES DISTRICT COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(SUBMITTED) September 20, 1984
October 29, 1984

Before
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge

UNPUBLISHED ORDER NOT
TO BE CITED PER
CIRCUIT RULE 35

IRA BANKS, Plaintiff-Appellant,

v.

FINLEY-SELIGMAN & LATZ, INC., Defendant-Appellee

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 80-C-1056
John W. Reynolds, Judge

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f).* The plaintiff has filed such a statement and requested oral argument. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

ORDER

After receiving two "right-to-sue" letters from the Equal Employment Opportunity Commission (E.E.O.C.) based on two separate charges, the *pro se* plaintiff, Ira Banks, brought suit against his former employer, Finley-Seligman & Latz, in the Eastern District of Wisconsin. The plaintiff's first "right-to-sue" letter, and his initial claim in the district court, were based on his charge that the defendant's pay system caused him to be paid less than certain white employees. The district court granted summary judgment on that claim, and we affirm. The plaintiff's second letter and his second claim in the district court concern his allegation that he was discharged in retaliation for protected Title VII activity. *See* 42 U.S.C. § 2000e-3. After reviewing the papers and affidavits filed, the district judge granted summary judgment for the defendant on the retaliation claim. We reverse and remand for further proceedings that portion of the case in which there are disputed issues of material fact.

The defendant is engaged in the business of repairing jewelry, watches, and similar items. The plaintiff, after completing an apprenticeship with the defendant in December 1974, continued to work for the defendant in the Gimbels Milwaukee, Wisconsin store as a fully qualified jeweler, until March 28, 1980. The plaintiff, a black, alleges that he was discriminated against on the basis of race because, as a jeweler, he was compensated for repair jobs at a piece-work rate (i.e. a rate based on the number of pieces completed) that was lower than the piece-work rate applied to repair jobs completed by watchmakers, who were all of the white race. Watchmakers were paid a percentage of the retail cost of the watch repair. In contrast, the method of compensation to jewelers was not based on the customer's cost of the repair, but on a point system that varied with the difficulty of the repair job.

With respect to the plaintiff's claim of racial discrimination in compensation, which formed the basis of his first right-to-sue letter, the district court ruled that the defen-

dant had established a business justification for its practice. The plaintiff disputes the court's conclusion. However, we need not reach this issue because the plaintiff has not made out a prima facie case of discrimination. Certainly, Title VII does protect against employment practices that are "fair in form but discriminatory in operation." *See Connecticut v. Teal,* 102 S. Ct. 2525, 2531 (1982). However, to attack facially neutral employment standards, such as the two methods of compensation at issue in this case, the plaintiff must establish that they have a disparate impact on minority group members. *See Carpenter v. Board of Regents of the University of Wisconsin,* 728 F.2d 911, 914 (7th Cir. 1984). The plaintiff has failed to do this. It is uncontroverted that part of the time that the plaintiff was employed by defendant, two whites were also employed as jewelers and were paid according to the same point system as the plaintiff. Title VII is silent about the method that employers select to figure wages, so long as the method does not have an adverse impact on minorities. Similarly the plaintiff's claim, under 42 U.S.C. Sections 1981 and 2000e-2, that the defendant's use of different methods to calculate the wages of watchmakers and jewelers constituted intentional race discrimination, must also fail. While the plaintiff has shown that watchmakers and jewelers had different pay scales he has not given any indication that he was treated differently as a jeweler because he is black. *See Ekanem v. Health and Hospital Corp.* 724 F.2d 563, 569 (7th Cir. 1983). White jewelers were paid according to the same point system as the plaintiff, and the district court properly entered summary judgment on the plaintiff's claim of discrimination in compensation.

As noted above, the district court also granted summary judgment on the plaintiff's allegation, which is the subject of his second right-to-sue letter, that he was terminated from his employment because he filed the above charge with the E.E.O.C. Filing a claim of employment discrimination is protected activity under Title VII, 42 U.S.C. § 20000e-3, regardless of whether the complaining party prevails in the

underlying charge of discrimination. *See Berg v. LaCrosse Cooler Co.*, 612 F.2d 1041, 1043 (7th Cir. 1980). The defendant entered affidavits stating that the plaintiff was not discharged but had voluntarily resigned. The defendant also submitted affidavits that the plaintiff was insubordinate in refusing to do a "special repair job" on a bracelet, and argued that this insubordination would have provided a legitimate nondiscriminatory reason to fire the plaintiff in any event. These affidavits, standing alone, might have been sufficient to support a grant of summary judgment for the defendant. In this case, however, the plaintiff (acting *pro se*) did not merely rest on the allegations in his complaint, *See Patterson v. General Motors*, 631 F.2d 476, 482 (7th Cir. 1980), but offered his own counter-affidavits in which he denied he had voluntarily resigned, and asserted that, at a meeting with officials of his former employer, his supervisor had threatened to quit unless the plaintiff was discharged. Further, the plaintiff averred that he, in fact, did repair the bracelet in question, contrary to the defendant's claims of insubordination. The plaintiff's affidavits raise disputed issues of fact that are material to the disposition of his retaliation claim. In light of this factual dispute the defendant's filings are inadequate to demonstrate that it is entitled to judgment as a matter of law. *See Big O Tire Dealers Inc. v. Big O Warehouse*, Nos. 83-2863 & 83-2902, slip op. at 9-10 (7th Cir. Aug. 17, 1984). Consequently, we remand the case for further proceedings consistent with this opinion.

The decision of the district court is AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

JUDGMENT IN A CIVIL CASE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

IRA BANKS,

v.

FINLEY-SELIGMAN & LATZ, INC.

Docket No. 80-C-1056
Judge John W. Reynolds

Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered. IT IS ORDERED AND ADJUDGED that this action is hereby dismissed.

U.S. District Court East. Dist. Wisc.
FILED
JAN 10, 1985
SOFRON B. NEDILSKY
CLERK

UNITED STATES DISTRICT COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(SUBMITTED) August 22, 1985*
September 4, 1985
Unpublished order not be cited per circuit rule 35

Before
Hon. WALTER J. CUMMINGS, Chief Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge

IRA BANKS, Plaintiff-Appellant,

v.

FINLEY-SELIGMAN & LATZ, INC., Defendant-Appellee.

No. 85-1188

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 80 C 1056
John W. Reynolds, Judge

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

ORDER

Plaintiff-appellant Ira Banks appeals the district court order of January 10, 1985 dismissing his employment discrimination action against defendant-appellee, Finley-Seligman & Latz, Inc. We affirm for the reasons explained below.

I.

Banks, a black jeweler, filed two employment discrimination claims with the Equal Employment Opportunity Commission against the defendant, his employer. The first claim alleged that the defendant's pay system was discriminatory because it caused him to be paid less than certain white employees. The second claim alleged that Banks was discharged by the defendant in retaliation for protected Title VII activity. *See* 42 U.S.C. § 2000e-3; *Klein v. Trustees of Indiana University,* No. 84-2124, slip op. (June 20, 1985); *Mozee v. Jeffboat, Inc.,* 746 F.2d 365 (7th Cir. 1984); *McCluney v. Jos. Schlitz Brewing Co.,* 728 F.2d 924 (7th Cir. 1984). After receiving right to sue letters on both claims, Banks filed suit in federal district court raising both claims. The district court granted summary judgment for the defendant on both claims. On appeal, we affirmed by unpublished order the grant of summary judgment on the claim that the defendant's pay structure was discriminatory, *Banks v. Finley-Seligman & Latz, Inc.,* No. 83-2981, unpublished order (7th Cir. Oct. 29, 1984). We reversed and remanded for further proceedings, however, with respect to the claim that Banks was terminated in retaliation for filing a claim against the defendant. On remand, the district court held a lengthy evidentiary hearing at the conclusion of which it dismissed Bank's claim, finding that Banks had failed to establish that he was terminated in retaliation for filing a discrimination claim against the defendant. It is from this decision that Banks appeals.

II.

Construing Banks' *pro se* briefs liberally, *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Bates v. Jean*, 745 F.2d 1146, 1150 (7th Cir. 1984), Banks contends the district court erred in concluding that he was not discharged in retaliation for filing a discrimination claim. "To establish a prima facie case of retaliatory discharge under 42 U.S.C. § 2000e.3, the plaintiff must show: (1) he opposed an employment practice that was unlawful within the meaning of Title VII; (2) he suffered an adverse action by his employer; (3) because of his opposition or participation." (footnote omitted). *Klein*, slip op. at 7; *Rucker v. Higher Educational Aids Bd.*, 669 F.2d 1179, 1182. The plaintiff must additionally establish that the employer "would not have taken the adverse action 'but for' his opposition or participation." *Klein*, slip op. at 8 citing *McCluney v. Jos. Schlitz Brewing Co.*, 728 F.2d 924, 928 (7th Cir. 1984).

The *prima facie* proof analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) is applicable to retaliatory discharge claims. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 235 n. 5 (1981) (The *McDonnell* analysis is flexible and adaptable to different fact situations); *Klein*, slip op. at 7, n. 3. Once the plaintiff establishes a *prima facie* case of employment discrimination, a rebuttable presumption of discrimination arises and the burden then shifts to the defendant to rebut the discrimination by articulating a legitimate, nondiscriminatory reason for its action. *McDonnell Douglas*, 411 U.S. at 802. If the defendant successfully rebuts the presumption of discrimination, the plaintiff must have the opportunity to demonstrate that the alleged reason for the employment action was merely pretextual. *Id.*

III.

In the present case, we vacated the award of summary judgment on the retaliation claim and remanded this case

to the district court for further proceedings. On remand, Banks tried his retaliation claim before the district court and, at the conclusion of the trial, the district court entered judgment for the defendant, finding that Banks had failed to demonstrate that he was discharged in retaliation for filing a complaint against the defendant. "In this Title VII case, our ultimate task is 'to determine whether the [plaintiffs have] proven that the defendants have discriminated against [them].'" *Mozee,* 746 F.2d at 369, citing *Epstein v. Secretary,* 739 F.2d 274, 278 (7th Cir. 1984). Our review of the district court's fact-findings is governed by the clearly erroneous test, Fed. R. Civ. P. 52(a), *Suson v. Zenith Radio Corp.,* 763 F.2d 304, 307 (7th Cir. 1985), while our review of the district court's ultimate conclusion of discrimination *vel non* is not so constrained. *Mozee,* 746 F.2d at 369; *Epstein,* 739 F.2d 274, 278-79 (7th Cir. 1984). After a careful review of the record, we concur with the district court's finding that Banks failed to establish that he was discharged in retaliation for filing a discrimination claim against the defendant.

The record reflects that Banks was hired by the defendant as a jeweler in 1972, that Banks filed a discrimination claim against the defendant relating to methods of payment on November 28, 1978, and that Banks left employment with the defendant on March 28, 1980, 16 months later. Banks then filed his second discrimination claim, alleging that he had been discharged in retaliation for filing his discrimination claim 16 months earlier. During this sixteen month period, Banks' work assignments and hours remained the same. On March 28, 1980, a dispute arose over repairs completed by Banks on a bracelet. Freinik, Banks' supervisor, requested Banks to redo repairs to the bracelet because they had not been completed correctly the first time. The defendant's policy in effect at the time required all employees to redo work again for various reasons, regardless of whose fault it was. Banks declined to redo the work. Freinik notified Sadow, the vice-president of the company, who called Banks into his office and an argument ensued. Banks con-

tended that Sadow brought up the discrimination charge at the meeting (although he could not remember what was said about it) and that Freinik stated to Sadow that if Banks was not fired, Freinik would quit. Banks also contended that he had discussed the discrimination charges with Freinik prior to the meeting: Banks testified that he was terminated at the meeting, allegedly in retaliation for filing the discrimination claim sixteen months earlier against the defendant.

Freinik testified that Banks was not terminated at the meeting but simply told that he had the option of performing the requested work or quitting and that Banks then stormed out of the meeting, picked up his tools and left. Freinik testified that the discrimination charge was never mentioned at the meeting with Sadow. Sadow testified that Freinik came into his office, complaining that Banks had refused to perform repairs upon a bracelet. Sadow called Banks into his office and Banks once again reiterated that he would not perform the jewelry repairs. At that point, Sadow told Banks that "it's a free country, you can work anyplace you want . . . if you want to quit, you can quit," (R. at 104). Banks then left the office, picked up his tools and left. Finally, Costigan, an employee of the defendant, testified that he was present in the shop at the time of the argument. Costigan saw Banks storm out of Sadow's office, throw his tools in a bag and leave. He stated that although he was aware that Banks had filed a discrimination charge against the defendant, he does not recall Banks being treated any differently than the other employees.

Basically, this case hinges on a question of credibility which we are hesitant to second-guess on appeal absent clear error. *Anderson v. City of Bessemer City,* _____ U.S. _____, 105 S. Ct. 1504, 1512-13 (1985); *In re Lemmon & Co., Inc.,* 742 F.2d 1064, 1070 (7th Cir. 1984); *Luedtke Eng. Co. v. Ind. Limestone Co.,* 740 F.2d 598, 601 (7th Cir. 1984); *Walsh v. Brewer,* 733 F.2d 473, 477 (7th Cir. 1984). Ample evidence supported the district court's determination that Banks was not discharged in retaliation for filing a discrimination

claim. Sixteen months passed between the time that Banks filed his discrimination claim and his subsequent termination of employment with the defendant. Banks himself was unable to point to overt instances of harassment or discrimination arising from the discrimination charge which he filed.[1] Although Banks testified that Sadow fired him in retaliation for filing the claim, both Sadow and Freinik testified otherwise. As such, we agree with the district court that Banks failed to establish that he was terminated in retaliation for filing a discrimination claim against the defendant.

AFFIRMED

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[1] THE COURT: Now why do you think one year and four months later, when you were discharged, that you were discharged for filing that complaint on November 28, 1978? Why do you think that?

A. Why do I think it? Simply because at the time from November of '78 until I was terminated, the type of work they needed done, I was the only one who was doing it. And this was in regards to their sales. As the year progressed, Mr. Freinik, who had gotten a friend of his and a couple outside stores to do some of the repairs, Mr. Freinik had become a little more hostile toward me in that category. Simply because I am assuming he did not feel I was no longer needed. That followed up with his threats as far as my being terminated.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
September 26, 1985

Before
Hon. WALTER J. CUMMINGS, Chief Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge

IRA BANKS, Plaintiff-Appellant,

v.

FINLEY-SELIGMAN & LATZ, INC., Defendant-Appellee.

No. 85-1188

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 80 C 1056
John W. Reynolds, Judge

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by plaintiff-appellant, all of the judges on the panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.